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ABBREVIATIONS OF COMMISSION REPORTS

Ann. Proc. Nat. Asso. R. Comrs.	Annual Proceedings of the National Association of Railway Commissioners.
Ann. Rep. Ala. R. C.	Annual Report of the Alabama Railroad Commission.
" " Ariz. C. C.	Annual Report of the Arizona Corporation Commission.
" " Ariz. R. C.	Arizona Railway Commission Annual Reports. 1909–10.
" " Ark. R. C.	Arkansas Railroad Commission Annual Reports.
" " Cal. Bd. R. Co.	California Board of Railroad Commissioners Annual Reports.
" " Can. R. C.	Board of Railway Commissioners of Canada Annual Reports.
" " Colo. P. U. C.	Annual Report of the Colorado Public Utilities Commission.
" " Col. S. R. C.	Colorado State Railroad Commission Annual Reports. 1907–14.
" " Conn. P. U. C.	Annual Report of the Connecticut Public Utilities Commission.
" " Conn. R. C.	Annual Report of the Connecticut Railroad Commissioners. 1853–1911.
" " Dist. Col. P. U. C.	Annual Report of the District of Columbia Public Utilities Commission.
" " Fla. R. C.	Annual Report of the Railroad Commission for the State of Florida.
" " Ga. R. C.	Annual Report of the Railroad Commission of Georgia.
" " Houston, Tex., P. S. C.	Houston, Texas, Public Service Commissioner, Annual Reports.
" " Ia. R. C.	Annual Report of the Iowa Board of Railroad Commissioners.
" " Ida. P. U. C.	Annual Report of the Idaho Public Utilities Commission.
" " Ill. P. U. C.	Annual Report of the Public Utilities Commission of Illinois.
" " Ill. R. & W. C.	Annual Report of the Illinois Railroad and Warehouse Commission. 1871–1913.
" " Ind. P. S. C.	Annual Report of the Indiana Public Service Commission.

Ann. Rep. Ind. R. C. .....Annual Report of the Railroad Commission of Indiana. 1906–1912.

" " Kan. R. C. .....Annual Report of the Railroad Commissioners of Kansas.

" " Ky. R. C. .....Annual Report of the Kentucky Railroad Commission.

" " La. R. C. .....Annual Report of the Railroad Commission of Louisiana.

" " Los Angeles Bd. P. U. .....Los Angeles, Cal., Board of Public Utilities Annual Reports. 1909–1913.

" " Manitoba P. U. C. Manitoba Public Utilities Commission, Canada, Annual Reports.

" " Mass. G. & E. L. C. .....Annual Report of the Massachusetts Board of Gas and Electric Light Commissioners.

" " Mass. High Com. Annual Report of the Massachusetts Highway Commission. (Tel. Cos.)

" " Mass. P. S. C. ..Annual Report of the Massachusetts Public Service Commission.

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GENERAL TABLE OF CASES REPORTED.

See also list of Appeals, Rehearings, and Modifications, post, p. xlviii.

A. & M. Teleph. Co., Re ..... (Ind.) (abstract) 285
Adams Transit Co., Harlacker v. ..... (Pa.) 12
Alabama Power Co., Compton v. ..... (Ala. Sup. Ct.) 724
Alhambra v. Pacific Electric R. Co. See Municipal League v. Southern P. Co. 152
All Railroads, Brotherhood of Locomotive Engineers v. ..... (Ind.) 668
All Railroads, Brotherhood of Locomotive Firemen and Enginemen v. (Ind.) 844
American R. Express Co., Wendel v. ..... (Mont.) (abstract) 282
Anacostia Citizens' Asso., Re ..... (D. C.) (abstract) 600
Anderson v. United Parcel Service ..... (Cal.) 265
Andover Water Co., Re ..... (Me.) (abstract) 236
Arizona Transp. Co., Re ..... (Ariz.) (abstract) 599
Armstead, Re ..... (Colo.) (abstract) 767
Armstrong Water Co., Kittanning v. (3 cases) ..... (Pa.) (abstract) 81
Armstrong Water Co., Kittanning v. (2 cases) ..... (Pa.) (abstract) 82
Armstrong Water Co., Kittanning v. (3 cases) ..... (Pa.) (abstract) 83
Armstrong Water Co., Kittanning v. ..... (Pa.) (abstract) 84
Ashton v. Northern Pennsylvania Power Co. ..... (Pa.) 236
Asplund v. Sante Fe ..... (N. M. Sup. Ct.) (abstract) 150
Atchison, T. & S. F. R. Co., Re ..... (Ariz.) (abstract) 321
Atchison, T. & S. F. R. Co., Re ..... (Ariz.) (abstract) 323
Atchison, T. & S. F. R. Co., Re ..... (Ariz.) (abstract) 846
Atchison, T. & S. F. R. Co. v. Kidd. See Kidd, Re 771
Atchison, T. & S. F. R. Co. v. State Highway Commission (Kan. Sup. Ct.) 326
Atlantic City R. Co., Seaboard By-Product Coke Co. v. (N. J.) (abstract) 92
Atlantic City R. Co., Seaboard By-Product Coke Co. v. (N. J.) (abstract) 283
Atlantic City R. Co., Seaboard By-Product Coke Co. v. (N. J.) (abstract) 600
Atlantic Coast Line R. Co., Tift v. ..... (Ga. Sup. Ct.) (abstract) 245
Atlantic Coast Line R. Co., Tift v. ..... (Ga. Sup. Ct.) (abstract) 499
Austin-Inland Teleph. Co., Kendrick v. ..... (Mo.) (abstract) 234
Auto Transit Co. v. Pickwick Stages ..... (Cal.) (abstract) 110
Ayres-Whiteside Transp. Co., Re ..... (Cal.) (abstract) 108
Backus-Brooks Co. v. Northern P. R. Co. ... (U. S. C. C. A.) (abstract) 233
Backus-Brooks Co. v. Northern P. R. Co. ... (U. S. C. C. A.) (abstract) 235
Backus-Brooks Co. v. Northern P. R. Co. ... (U. S. C. C. A.) (abstract) 280

Backus-Brooks Co. v. Northern P. R. Co. (2 cases)
(U. S. C. C. A.) (abstract) 281
Bamberger Electric R. Co., Re ..... (Utah) 116
Banton, Tyson & Brother v. (2 cases) ... (U. S. Sup. Ct.) (abstract) 243
Barboursville Water & Light Co., Re ..... (W. Va.) (abstract) 500
Barbour v. Walker ..... (Okla. Sup. Ct.) 623
Barron County Teleph. Co., Re ..... (Wis.) (abstract) 544
Bay and River Boat Owners' Asso. v. Frodsham ..... (Cal.) 173
Beals, Re ..... (Colo.) (abstract) 767
Beaver Dam v. Wisconsin Power & Light Co. ..... (Wis.) (abstract) 83
Bellanca v. Middlesex Water Co. ..... (N. J.) 591
Bell Teleph. Co., Re ..... (Can.) (abstract) 235
Bensberg, Re ..... (Colo.) (abstract) 106
Benton Harbor-St. Joe R. & Light Co., Re ..... (Mich.) (abstract) 151
Bergen Teleph. Co., Re ..... (Wis.) 129
Big Four Bus Lines, Harrrison v. (3 cases)
(Ky. Ct. App.) (abstract) 502
Big Three Employment Office, California Transit Co. v. ..... (Cal.) 385
Bill's Sightseeing Co., Re ..... (Colo.) 775
Blue & Gray Bus Line v. Terre Haute ..... (Ind.) 534
Board of Education of Rockaway v. Wharton & N. R. Co.
(N. J.) (abstract) 598
Boston & M. R. Co., Selectmen of Lyndeborough v. (N. H.) (abstract) 858
Brandhorst, Re ..... (Colo.) (abstract) 767
Brazil, Old Trails Express Co. v. ..... (Ind.) 440
Bressan, Re ..... (Colo.) (abstract) 106
Bridgeport Hydraulic Co., Re ..... (Conn.) (abstract) 80
Bromide Crushed Rock Co. v. Dolese Bros. Co.
(Okla. Sup. Ct.) (abstract) 139
Brotherhood of Locomotive Engineers v. All Railroads ..... (Ind.) 668
Brotherhood of Locomotive Firemen and Enginemen v. All Railroads
(Ind.) 844
Brubaker & Bros. v. Millersburg Home Water Co. ..... (Pa.) 808
Brubaker v. Millersburg Home Water Co. (2 cases) .. (Pa.) (abstract) 80
Brubaker v. Millersburg Home Water Co. (2 cases) (Pa.) (abstract) 82
Brubaker v. Millersburg Home Water Co. ..... (Pa.) (abstract) 83
Brubaker v. Millersburg Home Water Co. ..... (Pa.) (abstract) 84
Bucklin Teleph. Exch., Re ..... (Mo.) (abstract) 286
Bucyrus Teleph. Co., Re ..... (Ohio) (abstract) 84
Bunker Hill Teleph. Co., Re ..... (Ill.) (abstract) 93
Bunker Hill Teleph. Co., Re ..... (Ill.) (abstract) 589
Bus Transportation Co., Re ..... (Colo.) 645
Butterbaugh, Re ..... (Colo.) 41
Cadillac-Soo Lumber Co. v. Duluth, S. S. & A. R. Co. ..... (Mich.) 539
California Transit Co., Re ..... (Cal.) (abstract) 106
California Transit Co. v. Scott ..... (Cal.) 385
Camden & Rockland Water Co., Prescott v. ..... (Me.) (abstract) 234
Camden & Rockland Water Co., Prescott v. ..... (Me.) (abstract) 588
Camden & Rockland Water Co., Prescott v. ..... (Me.) (abstract) 591

Canary Taxicab Co. v. Terminal R. Asso. (Mo. Sup. Ct.) (abstract) 89
Capitol Stage Lines Co., Re ..... (Mo.) 677
Carnaggio Bros. v. Greenwood ..... (Miss. Sup. Ct.) (abstract) 588
Carnahan Valley R. Co., Re ..... (Pa.) (abstract) 322
Cartersburg Teleph. Co., Re ..... (Ind.) (abstract) 93
Central Develop. Asso. v. Southern P. Co. See Municipal League v. Southern P. Co. 152
Central Maine Power Co., Parker v. ..... (Me.) 852
Central Mendocino County Power Co., Re ..... (Cal.) (abstract) 516
Central Mendocino County Power Co., Re ..... (Cal.) (abstract) 518
Central Vermont R. Co., Royalton v. ..... (Vt. Sup. Ct.) 633
Chalmers, Re ..... (N. Y.) 332
Chicago & J. Transp. Co., Re ..... (Ill.) (abstract) 107
Chicago & N. W. Co., Dowling v. ..... (Neb.) (abstract) 326
Chicago & N. W. R. Co., Kenosha Sand & Gravel Co. v. (3 cases) (Wis.) (abstract) 94
Chicago & N. W. R. Co., Kenosha Sand & Gravel Co. v. (Wis.) (abstract) 234
Chicago & N. W. R. Co., Racine v. ..... (Wis.) (abstract) 324
Chicago, B. & Q. R. Co., Clay County v. ..... (Neb.) (abstract) 501
Chicago, B. & Q. R. Co., Daly v. ..... (Ill.) 661
Chicago, M. & St. P. R. Co., Re ..... (Minn.) (abstract) 325
Chicago, M. & St. P. R. Co., Mitchell Chamber of Commerce v. (S. D.) (abstract) 284
Chicago, M. & St. P. R. Co., Moede v. ..... (Minn.) 785
Chicago, M. & St. P. R. Co., National Stone Co. v. ... (Ill.) (abstract) 90
Chicago, M. & St. P. R. Co. v. Railroad Commission .. (Wis. Sup. Ct.) 502
Chicago, M. & St. P. R. Co., Stange Lumber Co. v. ..... (Wis.) 721
Chicago Motor Coach Co., Re ..... (Ill.) (abstract) 109
Chicago Motor Coach Co., Re ..... (Ill.) 564
Chicago, R. I. & P. R. Co., Moline Consumers Co. v. (Ill.) (abstract) 281
Chicago, R I. & P. R. Co. v. Public Service Commission (5 cases) (Mo. Sup. Ct.) (abstract) 323
Chicago, R. I. & P. R. Co. v. State ..... (Okla. Sup. Ct.) (abstract) 140
Chicago, R. I. & P. R. Co. v. State ..... (Okla. Sup. Ct.) 255
Choate, Re ..... (N. J.) 98
Citizens' Gas & Fuel Co. v. Warden (Ind. App. Ct.) (abstract) 590
Citizens' Mut. Teleph. & Teleg. Co., Tioga County Bell Teleph. Co. v. (Pa.) 712
Citizens Teleph. Co., Re ..... (Neb.) (abstract) 600
Citizens Teleph. Co. v. Sutherland Teleph. Co. ..... (Neb.) (abstract) 93
City R. Co., Dayton v. (3 cases) ..... (U. S. C. C. A.) (abstract) 500
Civic Center Asso v. Southern P. Co. See Municipal League v. Southern P. Co. 152
Clark, Re ..... (Colo.) (abstract) 767
Clark, Re ..... (Colo.) (abstract) 776
Clarks Summit Water Co., Hall v. ..... (Pa.) (abstract) 79
Clarks Summit Water Co., Hall v. (2 cases) ..... (Pa.) (abstract) 81
Clarks Summit Water Co., Hall v. ..... (Pa.) (abstract) 84

Clay County v. Chicago, B. & Q. R. Co. ..... (Neb.) (abstract) 501
Clear Creek Power & Develop. Co. v. Public Service Commission (Colo.) 506
Clear Lake Water Co., Re ..... (Cal.) (abstract) 516
Cleveland, C. C. & St. L. R. Co., Re ..... (Ill.) (abstract) 90
Cleveland, C. C. & St. L. R. Co., Re ..... (Ill.) (abstract) 859
Coast Counties Gas & E. Co., Re ..... (Cal.) (abstract) 517
Codd & Allen Lumber Co. v. McGoldrick Lumber Co. ..... (Idaho) 545
Codd v. McGoldrick Lumber Co. ..... (Idaho) 545
Coffey County Teleph. Co., Patrons v. ..... (Kan.) (abstract) 851
Collins, Re ..... (Colo.) (abstract) 767
Collins, Lehigh Traction Co. v. ..... (Pa.) (abstract) 111
Colonial Motor Coach Corp. v. Oswego ... (N. Y. Sup. Ct.) (abstract) 150
Colorado Motor Way, Re ..... (Colo.) (abstract) 859
Colorado Utilities Corp., Re ..... (Colo.) (abstract) 111
Columbia Gorge Motor Coach System, Re ..... (Wash.) 119
Com. ex rel. Richmond v. Richmond, F. & P. R. Co. ..... (Va.) 291
Com. ex rel. State Corp. Commission, Norfolk & W. R. Co. v. (Va. Ct. App.) 397
Compton v. Alabama Power Co. ..... (Ala. Sup. Ct.) 724
Consolidated Water & Development Co., Leatherman v. (Cal.) (abstract) 588
Cook, Re ..... (Colo.) (abstract) 767
Cook, Re ..... (Colo.) (abstract) 776
Coolidge v. Wisconsin Teleph. Co. ..... (Wis.) (abstract) 856
Cooper Bus Co. v. Public Utilities Commission ..... (Ohio Sup. Ct.) 738
Cooper v. McWilliams & Robinson ..... (Ky. Ct. App.) 731
Cornhusker Stage Lines, Re ..... (Colo.) 175
Corson, Re ..... (Pa.) (abstract) 111
Cotner Bus Line, Re ..... (Neb.) 686
County Comrs. of Flathead County v. Great Northern R. Co. (Mont.) 457
County Court, State Highway Commission v. ..... (Mo.) (abstract) 323
Craig, Re ..... (S. D.) (abstract) 110
Crawford & Son, Re ..... (Ind.) (abstract) 656
Crowell & Spencer Lumber Co. v. Louisiana Pub. Service Commission (La. Sup. Ct.) (abstract) 140
Cudahy Bros. Co., Re (2 cases) ..... (Wis.) (abstract) 79
Cudahy Bros. Co., Re (2 cases) ..... (Wis.) (abstract) 83
Dahl, Gilchrist v. ..... (N. Y. Sup. Ct. Sp. T.) 336
Dalton Teleph. Exch., Hedlund v. ..... (Neb.) (abstract) 600
Daly v. Chicago, B. & Q. R. Co. ..... (Ill.) 661
Daniels Taxi & Transfer Co., Re (2 cases) ..... (Pa.) (abstract) 110
Davison & Brother v. Pennsylvania R. Co. ..... (Pa.) (abstract) 92
Dayton v. City R. Co. (3 cases) ..... (U. S. C. C. A.) (abstract) 500
Dearborn, Re ..... (Cal.) (abstract) 283
Denny v. Muncie ..... (Ind. Sup. Ct.) (abstract) 501
Denver & Leadville Stage, Re ..... (Colo.) 41
Denver & R. G. W. R. Co., Re ..... (Utah) (abstract) 858
Denver & R. G. W. R. Co., Pike's Peak Consol. Fuel Co. v. .... (Colo.) 768

Denver Tramway Co., Temmer v. ..... (U. S. C. C. A.) (abstract) 76
Department of Highways v. Pennsylvania R. Co. ... (Pa.) (abstract) 324
Department of Public Works, Dryden Commercial Club v.
(Wash. Sup. Ct.) (abstract) 140
Department of Public Works ex rel. Patrons v. Washington Water Power Co. ..... (Wash.) 122
Department of Public Works, Northern P. R. Co. v.
(Wash. Sup. Ct.) (abstract) 425
Department of Public Works, State ex rel. Byram v. (Wash. Sup. Ct.) 421
Detroit, Red Star Drivers' Asso. v. ..... (Mich. Sup. Ct.) (abstract) 502
Dexter v. Missouri P. R. Co. ..... (Mo.) (abstract) 321
Dixfield Light & Water Co. v. Itself ..... (Me.) (abstract) 78
Dixfield Light & Water Co. v. Itself ..... (Me.) (abstract) 84
Dolese Bros. Co., Bromide Crushed Rock Co. v.
(Okla. Sup. Ct.) (abstract) 139
Dowling v. Chicago & N. W. Co. ..... (Neb.) (abstract) 326
Dryden Commercial Club v. Department of Public Works
(Wash. Sup. Ct.) (abstract) 140
Duluth, S. S. & A. R. Co., Cadillac-Soo Lumber Co. v. ..... (Mich.) 539
Dundy County Mut. Teleph. Co., Re ..... (Neb.) (abstract) 516
Dunning, Re ..... (Colo.) (abstract) 767
Eagle River Light & Water Commission, Re ..... (Wis.) (abstract) 591
Eastern Connecticut Power Co., Re ..... (Conn.) (abstract) 78
East Providence Water Co., Public Utilities Commission v.
(R. I. Sup. Ct.) (141
East Providence Water Co., Public Utilities Commission v.
(R. I. Sup. Ct.) 144
East St. Louis & I. Water Co., Re ..... (Ill.) 57
East 238th Street, Re ..... (N. Y. App. Div.) (abstract) 499
Egyptian Transp. System, Re ..... (Ill.) 43
Elgin, B. & Rockford R. Co., Re ..... (Ill.) (abstract) 653
Elkhart, Re ..... (Ind.) (abstract) 589
Elkhart, Re ..... (Ind.) (abstract) 590
Erb, Lehigh Valley Transit Co. v. ..... (Pa.) 606
Eternit and Chicago, B. & Q. R. Co., Re ..... (Mo.) (abstract) 846
Etheredge v. Norfolk ..... (Va. Sp. Ct. App.) 409
Evert v. Kulpmont Water Co. ..... (Pa.) (abstract) 94
Fain, Re ..... (Colo.) (abstract) 767
Fain, Re ..... (Colo.) (abstract) 776
Fairfax, Huffaker v. ..... (Okla. Sup. Ct.) (abstract) 151
Farina Bus Line & Transp. Co., Hammond v. ..... (U. S. Sup. Ct.) 382
Farmers Elevator Co., Re ..... (N. D.) 469
Farmers Teleph. Co. v. Wisconsin Teleph. Co. ..... (Wis.) 486
Fitzsimons Bus & Taxi Co., Re. See Bus Transportation Co., Re 645
Fort Bragg Electric Co., Re ..... (Cal.) (abstract) 516
Fresno Traction Co., Re ..... (Cal.) 167
Frodsham, Bay and River Boat Owners' Asso. v. ..... (Cal.) 173
Gallardo v. Porto Rico R. Light & P. Co. .. (U. S. C. C. A.) (abstract) 498
Geneva, S. F. & A. R. Co., Re ..... (N. Y.) (abstract) 598

Georgia Power Co., Re ..... (Ga.) 830
Giacomelli Brothers, Re ..... (Colo.) 425
Gilchrist v. Dahl ..... (N. Y. Sup. Ct. Sp. T.) 336
Gilchrist v. Wiggin ..... (N. Y. Sup. Ct. Sp. T.) 381
Glacier National Park Transport Co., Re ..... (Mont.) (abstract) 654
Glacier National Park Transport Co., Re ..... (Mont.) (abstract) 657
Gordon, Re ..... (Colo.) (abstract) 767
Grant, Re ..... (Colo.) (abstract) 767
Great Northern R. Co., County Comrs. of Flathead County v. (Mont.) 457
Green Bay & W. R. Co., Re (3 cases) ..... (Wis.) (abstract) 284
Green Bay & W. R. Co., Minneapolis, St. P. & S. S. M. R. Co. v. (Wis.) (abstract) 326
Greenwood, Carnaggio Bros. v. ..... (Miss. Sup. Ct.) (abstract) 588
Gregg v. Terre Haute ..... (Ind.) 534
Greyhound Co., Re ..... (S. D.) 239
Gribble, Re ..... (Colo.) (abstract) 767
Gribble, Re ..... (Colo.) (abstract) 776
Griffin, Re (2 cases) ..... (S. D.) (abstract) 244
Griffin, Re ..... (S. D.) (abstract) 499
Griffin, Re ..... (S. D.) (abstract) 500
Griffon v. Villia ..... (La.) (abstract) 652
Guerin, Re ..... (Pa.) 709
Hailey, Re ..... (Colo.) (abstract) 767
Hall, Re ..... (Colo.) (abstract) 654
Hall, Re ..... (Colo.) (abstract) 767
Hall v. Clarks Summit Water Co. ..... (Pa.) (abstract) 79
Hall v. Clarks Summit Water Co. (2 cases) ..... (Pa.) (abstract) 81
Hall v. Clarks Summit Water Co. ..... (Pa.) (abstract) 84
Hall, Standard Oil Co. v. (2 cases) ..... (U. S. Dist. Ct.) (abstract) 501
Hammond v. Farina Bus Line & Transp. Co. ..... (U. S. Sup. Ct.) 382
Hammond v. Schappi Bus Line ..... (U. S. Sup. Ct.) 388
Handelman v. Union Electric Light & P. Co. ..... (Mo.) 94
Hansen v. Oregon Short Line R. Co. ..... (Idaho) (abstract) 325
Harlacker v. Adams Transit Co. ..... (Pa.) 12
Harris, Re ..... (abstract) 767
Harrison, Re (2 cases) ..... (N. J.) (abstract) 322
Harrison v. Big Four Bus Lines (3 cases) (Ky. Ct. App.) (abstract) 502
Harrison v. United New Jersey R. & Canal Co. ..... (N. J. Ch.) 735
Harriss, Re ..... (Colo.) (abstract) 109
Hazleton Auto Bus Co., Motor Transp. Co. v. ..... (Pa.) 804
Hedlund v. Dalton Teleph. Exch. ..... (Neb.) (abstract) 600
Heter, Re ..... (Colo.) (abstract) 767
Heter, Re ..... (Colo.) (abstract) 776
Hoepner, Re ..... (Colo.) (abstract) 767
Holyoke Street R. Co., Re ..... (Mass.) 578
Home Teleph. Co., Re ..... (Ind.) 445
Home Teleph. Co., Re ..... (Minn.) (abstract) 286
Hoosier Transp. Co. v. Terre Haute ..... (Ind.) 534
Howe & Holt Transfer Co., Re ..... (Mont.) (abstract) 860

XUM

Hubman, Re ..... (Colo.) (abstract) 776
Hudson v. Railroad Commission ..... (Wis. Sup. Ct.) (abstract) 140
Hudson Valley R. Co., Re ..... (N. Y.) 1
Huffaker v. Fairfax ..... (Okla. Sup. Ct.) (abstract) 151
Hughes Electric Co., Re ..... (N. D.) 601
Idaho Power Co., Re ..... (Or.) 113
Ideal Teleph. Co., Re ..... (Mo.) (abstract) 544
Illinois C. R. Co., Re ..... (Ill.) (abstract) 857
Illinois C. R. Co., Re ..... (Ill.) (abstract) 859
Illinois Commerce Commission ex rel. North Shore Connecting R. Co., Roy v. (2 cases) ..... (Ill. Sup. Ct.) (abstract) 107
Illinois Commerce Commission ex rel. North Shore Connecting R. Co., Roy v. ..... (Ill. Sup. Ct.) (abstract) 139
Illinois Light & P. Co., Re ..... (Ill.) (abstract) 112
Illinois Northern Utilities Co., Mayer v. ..... (Ill.) 529
Illinois Power & Light Corp., Re ..... (Ill.) 776
Illinois Southern Teleph. Co., McCoy v. ..... (Ill.) (abstract) 590
Indiana Electric Corp., Re ..... (Ind.) (abstract) 517
Indianapolis Street R. Co., Re ..... (Ind.) 670
Indianapolis Street R. Co., Rountree v. ..... (Ind.) 85
Indianapolis Street R. Co., Thompson v. ..... (Ind.) (abstract) 597
Indiana Service Corp., Re ..... (Ind.) 531
Industry Teleph. Co., Re ..... (Ill.) 435
Inter-City Coach Co., Re ..... (R. I.) (abstract) 657
Interstate Pub. Service Co., Re ..... (Ind.) (abstract) 850
Interstate Teleph. Co., Re ..... (Neb.) 587
Iowa Light, Heat & P. Co., Sac City v. (2 cases) (Iowa Sup. Ct.) (abstract) 151
Isaacson, Re ..... (Wis.) (abstract) 656
Itself, Dixfield Light & Water Co. v. ..... (Me.) (abstract) 78
Itself, Dixfield Light & Water Co. v. ..... (Me.) (abstract) 84
Jersey City-Greenwood Lake Bus Co., Re ..... (N. J.) (abstract) 107
Johnsonburg R. Co., Re ..... (Pa.) (abstract) 598
Kankakee-Gilman Bus Line, Re ..... (Ill.) (abstract) 107
Kansas City Pub. Service Co., Re ..... (Mo.) 582
Kansas City S. R. Co., Shreveport Chamber of Commerce v. (La.) (abstract) 851
Kansas City S. R. Co. v. United States ... (U. S. Dist. Ct.) (abstract) 77
Kansas City S. R. Co. v. United States ... (U. S. Dist. Ct.) (abstract) 79
Kansas City Teleph. Co., Re ..... (Mo.) (abstract) 591
Kansas, O. & Gulf R. Co. v. State ..... (Okla. Sup. Ct.) 825
Kendrick v. Austin-Inland Teleph. Co. ..... (Mo.) (abstract) 234
Kenosha Sand & Gravel Co. v. Chicago & N. W. R. Co. (3 cases) (Wis.) (abstract) 94
Kenosha Sand & Gravel Co. v. Chicago & N. W. R. Co. (Wis.) (abstract) 234
Kentucky R. Commission, United Fuel Gas Co. v. ..... (U. S. Dist. Ct.) (abstract) 84

Kentucky R. Commission, United Fuel Gas Co. v. (2 cases) (U. S. Dist. Ct.) (abstract) 500
Kentucky R. Commission, United Fuel Gas Co. v. (U. S. Dist. Ct.) (abstract) 589
Key System Transit Co., Re ..... (Cal.) (abstract) 109
Kidd, Re ..... (Colo.) 771
Kidd, Atchison, T. & S. F. R. Co. v. ..... (Colo.) 771
King v. Trueman ..... (N. B. Sup. Ct.) (abstract) 76
Kirwan Taxi Co. v. Webb ..... (Pa.) 604
Kittanning v. Armstrong Water Co. (3 cases) ..... (Pa.) (abstract) 81
Kittanning v. Armstrong Water Co. (2 cases) ..... (Pa.) (abstract) 82
Kittanning v. Armstrong Water Co. (3 cases) ..... (Pa.) (abstract) 83
Kittanning v. Armstrong Water Co. ..... (Pa.) (abstract) 84
Kulpmont Water Co., Evert v. ..... (Pa.) (abstract) 94
Labelle, Re ..... (R. I.) 474
La Crosse, Re ..... (Wis.) (abstract) 287
Laddonia Rural Teleph. Co., Re ..... (Mo.) (abstract) 544
Lake v. Milwaukee ..... (Wis.) (abstract) 857
Lake Shore, Re ..... (Minn.) (abstract) 245
Lakewood Water Co., Re ..... (N. J.) 705
Leatherman v. Consolidated Water & Development Co. (Cal.) (abstract) 588
Lefebvre, State v. ..... (Minn. Sup. Ct.) 14
Lehigh Traction Co. v. Collins ..... (Pa.) (abstract) 111
Lehigh Traction Co. v. Motor Transp. Co. ..... (Pa.) 804
Lehigh Valley Transit Co. v. Erb ..... (Pa.) 606
Leonia v. New Jersey & H. R. R. & Ferry Co. ..... (N. J.) 464
Lepel, Re ..... (Colo.) (abstract) 767
Lewis, Re ..... (S. D.) 246
Lilley, Re ..... (Colo.) 184
Lincoln-Nebraska City Coach Line, Re ..... (Neb.) (abstract) 597
Lincoln Traction Co., Re ..... (Neb.) 861
Lodi Teleph. Co., Re ..... (Wis.) (abstract) 600
Louisiana Pub. Service Commission, Crowell & Spencer Lumber Co. v. (La. Sup. Ct.) (abstract) 140
Loveland, Public Service Co. v. ..... (Colo. Sup. Ct.) (abstract) 82
Lumberman's Co. v. Seaboard Air Line R. Co. (Ga. Ct. App.) (abstract) 283
Lykins v. Public Utilities Commission ..... (Ohio Sup. Ct.) (abstract) 110
Lykins v. Public Utilities Commission .... (Ohio Sup. Ct.) (abstract) 139
Lykins v. Public Utilities Commission ..... (Ohio Sup. Ct.) 396
McCoy v. Illinois Southern Teleph. Co. ..... (Ill.) (abstract) 590
McGlashing, Red Top Cab Co. v. ..... (Iowa Sup. Ct.) (abstract) 91
McGlochlin, Re ..... (Colo.) (abstract) 776
McGoldrick Lumber Co., Codd v. ..... (Idaho) 545
McLaren, Re. See Lewis, Re 246
McWilliams & Robinson, Cooper v. ..... (Ky. Ct. App.) 731
Madison, Re ..... (Colo.) (abstract) 767
Madison, Re ..... (Colo.) (abstract) 776
Madison Light & P. Co., Re ..... (Ind.) 847
Maine C. R. Co., Re ..... (Me.) (abstract) 325

Maine C. R. Co., Warren Co. v. ..... (Me. Sup. Ct.) (abstract) 544
Mamaroneck v. New York Interurban Water Co.
(N. Y. Sup. Ct.) (abstract) 500
Manufacturers R. Co., Re ..... (Mo.) (abstract) 322
Marmet Gas Co. v. Marmet ..... (W. Va. Ct. App.) (abstract) 151
Marmet, Marmet Gas Co. v. ..... (W. Va. Ct. App.) (abstract) 151
Maroa Electric Light Co., Re ..... (Ill.) 776
Maryland v. Rubin ..... (Md. Traffic Ct.) (abstract) 245
Mayer v. Illinois Northern Utilities Co. ..... (Ill.) 529
Meeker-Rangely Stage Line, Re ..... (Colo.) (abstract) 776
Menominee & M. Light & Traction Co., Re ..... (Mich.) 87
Merchants Asso. of Shenandoah v. Schuylkill R. Co. (Pa.) (abstract) 81
Merchants Asso. of Shenandoah v. Schuylkill R. Co. (Pa.) (abstract) 83
Merrifield v. Mountain States Power Co. ..... (Mont.) 798
Michigan Pub. Service Commission, Re ..... (Mich.) (abstract) 589
Middlesex Water Co., Bellanca v. ..... (N. J.) 591
Milburn Teleph. Co., Southwestern Bell Teleph. Co. v.
(Okla.) (abstract) 591
Millersburg Home Water Co., Brubaker v. (2 cases) (Pa.) (abstract) 80
Millersburg Home Water Co., Brubaker v. (2 cases) (Pa.) (abstract) 82
Millersburg Home Water Co., Brubaker v. ..... (Pa.) (abstract) 83
Millersburg Home Water Co., Brubaker v. ..... (Pa.) (abstract) 84
Millersburg Home Water Co., Brubaker & Bros. v. ..... (Pa.) 808
Milwaukee, Lake v. ..... (Wis.) (abstract) 857
Minneapolis, St. P. & S. S. M. R. Co. v. Green Bay & W. R. Co.
(Wis.) (abstract) 326
Missouri P. R. Co., Dexter v. ..... (Mo.) (abstract) 321
Missouri P. R. Co. v. Red Star Milling Co. (Kan. Sup. Ct.) (abstract) 283
Missouri Power & Light Co., Re ..... (Mo.) (abstract) 597
Missouri Transit Co., Re ..... (Mo.) (abstract) 860
Mitchell Chamber of Commerce v. Chicago, M. & St. P. R. Co.
(S. D.) (abstract) 284
Moede v. Chicago, M. & St. P. R. Co. ..... (Minn.) 785
Moline Consumers Co. v. Chicago, R. I. & P. R. Co. (Ill.) (abstract) 281
Montesano v. Montesano Teleph. Co. ..... (Wash.) (abstract) 83
Montesano Teleph. Co., Montesano v. ..... (Wash.) (abstract) 83
Montezuma County Teleph. Co., Re ..... (Colo.) 518
Morris County Traction Co., Re ..... (N. J.) 98
Mosman, Re ..... (Colo.) (abstract) 776
Motor Transp. Co. v. Hazleton Auto Bus Co. See Lehigh Traction Co. v. Motor Transp. Co. 804
Motor Transp. Co., Lehigh Traction Co. v. ..... (Pa.) 804
Motor Vehicle Freight Classification, Re ..... (Or.) (abstract) 90
Mound City & Eastern R. Co., Re ..... (S. D.) (abstract) 654
Mountain States Power Co., Merrifield v. ..... (Mont.) 798
Mountain States Teleph. & Teleg. Co., Re ..... (Idaho) 269
Mountain Water Service Co., Re ..... (N. J.) (abstract) 75
Mountain Water Service Co., Re ..... (N. J.) (abstract) 82
Mountain Water Service Co., Re ..... (N. J.) 287

Mt. Gretna Brownstone Co. v. Pennsylvania R. Co. (Pa.) (abstract) 284
Muncie, Denny v. ..... (Ind. Sup. Ct.) (abstract) 501
Municipal League v. Southern P. Co. ..... (Cal.) 152
Municipal Water Plant, Re ..... (Ind.) (abstract) 860
Muscati, Re ..... (Colo.) 764
Muscoda Bridge Co. v. Muscoda ..... (Wis. Sup. Ct.) 146
Muscoda, Muscoda Bridge Co. v. ..... (Wis. Sup. Ct.) 146
Muskegon Traction & Lighting Co., Re ..... (Mich.) (abstract) 282
National Stone Co. v. Chicago, M. & St. P. R. Co. ... (Ill.) (abstract) 90
Neklason v. Ratterree Bros. ..... (Cal.) (abstract) 601
New Jersey & H. R. R. & Ferry Co., Leonia v. ..... (N. J.) 464
New Lebanon Teleph. Co., Re ..... (Ind.) (abstract) 286
New York Interurban Water Co., Mamaroneck v.
(N. Y. Sup. Ct.) (abstract) 500
New York, N. H. & H. R. Co., Re ..... (Conn.) (abstract) 106
New York, Rapid Transit Subway Construction Co. v. (4 cases)
(N. Y. Sup. Ct.) (abstract) 234
New York Teleph. Co., Re ..... (N. J.) (abstract) 93
Niagara, L. & O. Power Co. v. Seneca Iron & Steel Co. (2 cases)
(N. Y. Sup. Ct.) (abstract) 282
Niagara, L. & O. Power Co. v. Seneca Iron & Steel Co.
(N. Y. Sup. Ct.) (abstract) 500
Norfolk & W. R. Co. v. Com. ex rel. State Corp. Commission
(Va. Ct. App.) 397
Norfolk, Etheredge v. ..... (Va. Sp. Ct. App.) 409
Northern Indiana Power Co., Re ..... (Ind.) 273
Northern Indiana Power Co., Re ..... (Ind.) (abstract) 517
Northern Indiana Pub. Service Co., Re ..... (Ind.) (abstract) 80
Northern Indiana Pub. Service Co., Re ..... (Ind.) (abstract) 84
Northern Indiana Pub. Service Co., Re ..... (Ind.) (abstract) 517
Northern P. R. Co., Backus-Brooks Co. v. .. (U. S. C. C. A.) (abstract) 233
Northern P. R. Co., Backus-Brooks Co. v. .. (U. S. C. C. A.) (abstract) 235
Northern P. R. Co., Backus-Brooks Co. v. .. (U. S. C. C. A.) (abstract) 280
Northern P. R. Co., Backus-Brooks Co. v. (2 cases)
(U. S. C. C. A.) (abstract) 281
Northern P. R. Co. v. Department of Public Works
(Wash. Sup. Ct.) (abstract) 425
Northern P. R. Co., United States v. ..... (U. S. Dist. Ct.) (abstract) 92
Northern Pennsylvania Power Co., Ashton v. ..... (Pa.) 236
Northern Utilities Corp., Starkweather v. ..... (N. D.) 699
North-West Teleph. Co., Re ..... (Wis.) (abstract) 286
North-West Teleph. Co., Re ..... (Wis.) 480
Nuckolls County Independent Teleph. Co., Re ..... (Neb.) (abstract) 516
Nuckolls County Independent Teleph. Co., Re ..... (Neb.) (abstract) 518
Nuttall, Re ..... (Colo.) (abstract) 767
Nuttall, Re ..... (Colo.) (abstract) 776
Ohio Valley Transit Co. v. Public Utilities Commission (Ohio Sup. Ct.) 404
Old Trails Express Co. v. Brazil ..... (Ind.) 440
Omaha & C. B. R. & Bridge Co., Re ..... (Neb.) 689

XUM

Oregon Short Line R. Co., Hansen v. ..... (Idaho) (abstract) 325
Osborn, Stone v. ..... (Ohio Ct. App.) 25
Oswego, Colonial Motor Coach Corp. v. .. (N. Y. Sup. Ct.) (abstract) 150
Overall, Re ..... (Cal.) (abstract) 111
Pacific Electric R. Co., Alhambra v. ..... (Cal.) 152
Pacific Electric R. Co., Pasadena v. ..... (Cal.) 152
Pacific Electric R. Co., San Gabriel v. ..... (Cal.) 152
Pacific Electric R. Co., South Pasadena v. ..... (Cal.) 152
Pacific States Butter, Eggs, Cheese & Poultry Asso. v. Southern P. Co. ..... (Cal.) (abstract) 283
Padgett, Re ..... (Colo.) (abstract) 776
Paradox Land & Transport Co., Re ..... (Colo.) 648
Parker, Re ..... (Colo.) (abstract) 767
Parker, Re ..... (Colo.) (abstract) 776
Parker v. Central Maine Power Co. ..... (Me.) 852
Pasadena v. Pacific Electric R. Co. See Municipal League v. Southern P. Co. 152
Patrons v. Coffey County Teleph. Co. ..... (Kan.) (abstract) 851
Pennsylvania R. Co., Re ..... (Ind.) (abstract) 858
Pennsylvania R. Co., Re ..... (N. J.) 594
Pennsylvania R. Co., Davison & Brother v. ..... (Pa.) (abstract) 92
Pennsylvania R. Co., Department of Highways v. ... (Pa.) (abstract) 324
Pennsylvania R. Co., Mt. Gretna Brownstone Co. v. (Pa.) (abstract) 284
Pennsylvania R. Co. v. Public Utilities Commission. See Ohio Valley Transit Co. v. Public Utilities Commission 404
Perry-Hollandale Teleph. Co., Re ..... (Wis.) (abstract) 280
Philadelphia Rural Transit Co., Re ..... (Pa.) (abstract) 655
Philadelphia Rural Transit Co., Re ..... (Pa.) (abstract) 656
Pickwick Stages, Auto Transit Co. v. ..... (Cal.) (abstract) 110
Pike's Peak Consol. Fuel Co. v. Denver & R. G. W. R. Co. .... (Colo.) 768
Pioneer Truck & Transfer Co., Re ..... (Cal.) (abstract) 516
Porto Rico R. Light & P. Co., Gallardo v. (U. S. C. C. A.) (abstract) 498
Powell, Re ..... (S. D.) 475
Prairie Teleph. Co., Wilson v. ..... (Ind.) (abstract) 850
Prentice Mut. Teleph. Co., Re ..... (Wis.) 613
Prescott v. Camden & Rockland Water Co. ..... (Me.) (abstract) 234
Prescott v. Camden & Rockland Water Co. ..... (Me.) (abstract) 588
Prescott v. Camden & Rockland Water Co. ..... (Me.) (abstract) 591
Public Service Commission, Chicago, R. I. & P. R. Co. v. (5 cases) (Mo. Sup. Ct.) (abstract) 323
Public Service Commission, Clear Creek Power & Develop. Co. v. (Colo.) 506
Public Service Commission, State ex rel. Campbell Iron Co. v. (Mo. Sup. Ct.) 17
Public Service Commission, State ex rel. Missouri P. R. Co. v. (Mo. Sup. Ct.) 615
Public Service Commission, State ex rel. Wabash R. Co. v. (Mo. Sup. Ct.) 490
Public Service Co., Re ..... (Colo.) (abstract) 105
Public Service Co., Re ..... (Colo.) (abstract) 106

Public Service Co. v. Loveland ..... (Colo. Sup. Ct.) (abstract) 82
Public Utilities Commission, Cooper Bus Co. v. ..... (Ohio Sup. Ct.) 738
Public Utilities Commission v. East Providence Water Co.
(R. I. Sup. Ct.) 141
Public Utilities Commission v. East Providence Water Co.
(R. I. Sup. Ct.) 144
Public Utilities Commission, Lykins v. .. (Ohio Sup. Ct.) (abstract) 110
Public Utilities Commission, Lykins v. .. (Ohio Sup. Ct.) (abstract) 139
Public Utilities Commission, Lykins v. ..... (Ohio Sup. Ct.) 396
Public Utilities Commission, Ohio Valley Transit Co. v.
(Ohio Sup. Ct.) 404
Public Utilities Commission, Pennsylvania R. Co. v. .. (Ohio Sup. Ct.) 404
Public Utilities Commission, Ramsey v. (2 cases)
(Ohio Sup. Ct.) (abstract) 112
Public Utilities Commission, Southern Ohio Pub. Service Co. v.
(Ohio Sup. Ct.) (abstract) 112
Public Utilities Commission, Southern Ohio Pub. Service Co. v.
(Ohio Sup. Ct.) (abstract) 236
Public Utilities Commission, Wheeling Traction Co. v.
(Ohio Sup. Ct.) 404
Public Utility Comrs., Rahway Valley R. Co. v. .... (N. J. Sup. Ct.) 135
Puett, Re ..... (Colo.) (abstract) 776
Purple Swan Safety Coach Lines, Re ..... (Mo.) 193
Racine v. Chicago & N. W. R. Co. ..... (Wis.) (abstract) 324
Rahway Valley R. Co. v. Public Utility Comrs. .... (N. J. Sup. Ct) 135
Railroad Commission, Chicago, M. & St. P. R. Co. v. .. (Wis. Sup. Ct.) 502
Railroad Commission, Hudson v. ..... (Wis. Sup. Ct.) (abstract) 140
Railroad Commission, Sutter Butte Canal Co. v. .... (Cal. Sup. Ct.) 811
Railroads, Shreveport Chamber of Commerce v. .... (La.) (abstract) 851
Raisor, Re ..... (Ind.) (abstract) 112
Ramsey v. Public Utilities Commission (2 cases)
(Ohio Sup. Ct.) (abstract) 112
Rapid Transit Subway Construction Co. v. New York (4 cases)
(N. Y. Sup. Ct.) (abstract) 234
Ratterree Bros., Neklason v. ..... (Cal.) (abstract) 601
Red Star Drivers' Asso. v. Detroit ..... (Mich. Sup. Ct.) (abstract) 502
Red Star Milling Co., Missouri P. R. Co. v. (Kan. Sup. Ct.) (abstract) 283
Red Top Cab Co. v. McGlashing ..... (Iowa Sup. Ct.) (abstract) 91
Rice, Re ..... (Colo.) (abstract) 767
Rice, Re ..... (Colo.) (abstract) 776
Richmond, F. & P. R. Co., Com. ex rel. Richmond v. ..... (Va.) 291
Rinebold v. Webb ..... (Pa.) 604
Rogers, Re ..... (Mich.) 781
Rolla Teleph. Co., Re ..... (Mo.) (abstract) 80
Rossville Home Teleph. Co., Re ..... (Ind.) (abstract) 590
Rountree v. Indianapolis Street R. Co. ..... (Ind.) 85
Royalton v. Central Vermont R. Co. ..... (Vt. Sup. Ct.) 633
Roy v. Illinois Commerce Commission ex rel. North Shore
Connecting R. Co. (2 cases) ..... (Ill. Sup. Ct.) (abstract) 107

Roy v. Illinois Commerce Commission ex rel. North Shore Connecting R. Co. ..... (Ill. Sup. Ct.) (abstract) 139
Rubin, Maryland v. ..... (Md. Traffic Ct.) (abstract) 245
Rule 18 Regulating Heating Value of Gas, Re ..... (Colo.) 657
Rules and Regulations Governing Electric Lines, Re ..... (Wis.) 716
Rushville Co-op. Teleph. Co., Re ..... (Ind.) (abstract) 93
Sac City v. Iowa Light, Heat & P. Co. (2 cases) (Iowa Sup. Ct.) (abstract) 151
St. Croix Valley Teleph. Co., Re ..... (Wis.) 131
St. Joseph R. Light, Heat & P. Co., Re ..... (Mo.) (abstract) 325
St. Louis & O'Fallon R. Co. v. United States ..... (U. S. Dist. Ct.) 740
St. Louis-S. F. R. Co. v. State ..... (Okla. Sup. Ct.) (abstract) 499
St. Louis-S. F. R. Co., Stoddard County v. ..... (Mo.) 788
Sandoval, Re ..... (Colo.) (abstract) 106
San Francisco, N. & C. R. Co. v. Western Motor Transport Co. (Cal.) (abstract) 105
San Gabriel v. Pacific Electric R. Co. See Municipal League v. Southern P. Co. 152
Santa Fe, Asplund v. ..... (N. M. Sup. Ct.) (abstract) 150
Schappi Bus Line, Hammond v. ..... (U. S. Sup. Ct.) 388
Schuylkill R. Co., Merchants Asso. of Shenandoah v. (Pa.) (abstract) 81
Schuylkill R. Co., Merchants Asso. of Shenandoah v. (Pa.) (abstract) 83
Schwilke, Re ..... (Colo.) (abstract) 655
Scott, California Transit Co. v. ..... (Cal.) 385
Seaboard Air Line R. Co., Lumberman's Co. v. (Ga. Ct. App.) (abstract) 283
Seaboard Air Line R. Co., State ex rel. Burr v. (Fla. Sup. Ct.) (abstract) 139
Seaboard Air Line R. Co., State ex rel. Burr v. (Fla. Sup. Ct.) (abstract) 499
Seaboard By-Product Coke Co. v. Atlantic City R. Co. (N. J.) (abstract) 92
Seaboard By-Product Coke Co. v. Atlantic City R. Co. (N. J.) (abstract) 283
Seaboard By-Product Coke Co. v. Atlantic City R. Co. (N. J.) (abstract) 600
Second Avenue R. Co., Re ..... (N. Y.) 332
Selectmen of Lyndeborough v. Boston & M. R. Co. .. (N. H.) (abstract) 858
Seneca Iron & Steel Co., Niagara L. & O. Power Co. v. (2 cases) ..... (N. Y. Sup. Ct.) (abstract) 282
Seneca Iron & Steel Co., Niagara, L. & O. Power Co. v. (N. Y. Sup. Ct.) (abstract) 500
Seven Falls Co., Re ..... (Colo.) (abstract) 767
Shaver v. Shavertown Water Co. ..... (Pa.) (abstract) 81
Shaver v. Shavertown Water Co. ..... (Pa.) (abstract) 84
Shavertown Water Co., Shaver v. ..... (Pa.) (abstract) 81
Shavertown Water Co., Shaver v. ..... (Pa.) (abstract) 84
Shiawassee Teleph. Co., Re ..... (Mich.) (abstract) 589
Shreveport Chamber of Commerce v. Kansas City S. R. Co. (La.) (abstract) 851

Shreveport Chamber of Commerce v. Railroads ..... (La.) (abstract) 851
Sidney Teleph. Co., Re ..... (Ohio) (abstract) 84
Smith, State v. ..... (Ariz. Sup. Ct.) (abstract) 245
Southern Bell Teleph. & Teleg. Co., Re ..... (Fla.) (abstract) 285
Southern Bell Teleph. & Teleg. Co., Re ..... (N. C.) (abstract) 286
Southern Ohio Pub. Service Co. v. Public Utilities Commission ..... (Ohio Sup. Ct.) (abstract) 112
Southern Ohio Pub. Service Co. v. Public Utilities Commission (Ohio Sup. Ct.) (abstract) 236
Southern P. Co., Re ..... (Ariz.) (abstract) 597
Southern P. Co., Re ..... (Cal.) (abstract) 598
Southern P. Co., Re. See Municipal League v. Southern P. Co. 152
Southern P. Co., Central Develop. Asso. v. ..... (Cal.) 152
Southern P. Co., Civic Center Asso. v. ..... (Cal.) 152
Southern P. Co., Municipal League v. ..... (Cal.) 152
Southern P. Co., Pacific States Butter, Eggs, Cheese & Poultry Asso. v. ..... (Cal.) (abstract) 283
South Pasadena v. Pacific Electric R. Co. See Municipal League v. Southern P. Co. 152
Southwestern Bell Teleph. Co., Re ..... (Okla.) (abstract) 852
Southwestern Bell Teleph. Co. v. Milburn Teleph. Co. (Okla.) (abstract) 591
Spencer-Martinsville Motor Line, Re ..... (Ind.) (abstract) 112
Spradling, Re ..... (Colo.) (abstract) 767
Springfield Gas & E. Co., Re ..... (Mo.) (abstract) 852
Springfield Traction Co., Re ..... (Mo.) 675
Standard Oil Co. v. Hall (2 cases) ..... (U. S. Dist. Ct.) (abstract) 501
Stange Lumber Co. v. Chicago, M. & St. P. R. Co. ..... (Wis.) 721
Stanley Power Co., Re ..... (Colo.) 527
Starkweather v. Northern Utilities Corp. ..... (N. D.) 699
State, Chicago, R. I. & P. R. Co. v. (2 cases) (Okla. Sup. Ct.) (abstract) 140
State, Chicago, R. I. & P. R. Co. v. ..... (Okla. Sup. Ct.) 255
State ex rel. Burr v. Seaboard Air Line R. Co. (Fla. Sup. Ct.) (abstract) 139
State ex rel. Burr v. Seaboard Air Line R. Co. (Fla. Sup. Ct.) (abstract) 499
State ex rel. Byram v. Department of Public Works .. (Wash. Sup. Ct.) 421
State ex rel. Campbell Iron Co. v. Public Service Commission (Mo. Sup. Ct.) 17
State ex rel. Missouri P. R. Co. v. Public Service Commission (Mo. Sup. Ct.) 615
State ex rel. Wabash R. Co. v. Public Service Commission (Mo. Sup. Ct.) 490
State Highway Commission, Atchison, T. & S. F. R. Co. v. (Kan. Sup. Ct.) 326
State Highway Commission v. County Court ..... (Mo.) (abstract) 323
State, Kansas, O. & Gulf R. Co. v. ..... (Okla. Sup. Ct.) 825
State v. Lefebvre ..... (Minn. Sup. Ct.) 14
Staten Island Rapid Transit R. Co., Re ..... (N. Y.) (abstract) 544

State, St. Louis-S. F. R. Co. v. ..... (Okla. Sup. Ct.) (abstract) 499
State v. Smith ..... (Ariz. Sup. Ct.) (abstract) 245
State Teleph. Co., Re ..... (Wis.) 249
Stoddard County v. St. Louis-S. F. R. Co. ..... (Mo.) 788
Stone v. Osborn ..... (Ohio Ct. App.) 25
Susanville Water Co., Re ..... (Cal.) (abstract) 590
Sutherland Teleph. Co., Citizens Teleph. Co. v. .... (Neb.) (abstract) 93
Sutter-Butte Canal Co., Re ..... (Cal.) (abstract) 517
Sutter-Butte Canal Co., Re ..... (Cal.) (abstract) 590
Sutter Butte Canal Co. v. Railroad Commission ..... (Cal. Sup. Ct.) 811
Taylor, Re ..... (Colo.) (abstract) 767
Temmer v. Denver Tramway Co. ..... (U. S. C. C. A.) (abstract) 76
Terminal R. Asso., Canary Taxicab Co. v. .. (Mo. Sup. Ct.) (abstract) 89
Terre Haute, Gregg v. ..... (Ind.) 534
Thompson v. Indianapolis Street R. Co. ..... (Ind.) (abstract) 597
Tift v. Atlantic Coast Line R. Co. ..... (Ga. Sup. Ct.) (abstract) 245
Tift v. Atlantic Coast Line R. Co. ..... (Ga. Sup. Ct.) (abstract) 499
Tioga County Bell Teleph. Co. v. Citizens' Mut. Teleph. & Teleg. Co. (Pa.) 712
Tocsin Teleph. Co., Re ..... (Ind.) (abstract) 589
Tostanoski, Re ..... (N. Y.) 187
Townsend, Re ..... (Colo.) 175
Townsend, Re ..... (Colo.) (abstract) 767
Tracy Gas Co., Re ..... (Cal.) 512
Tri City R. Co., Re ..... (Ill.) (abstract) 849
Tripp, Re ..... (Colo.) (abstract) 108
Trowbridge, Re ..... (Wash.) (abstract) 110
Troy Teleph. Co., Re ..... (Mo.) (abstract) 500
Trueman, King v. ..... (N. B. Sup. Ct.) (abstract) 76
Tyson & Brother v. Banton (2 cases) .... (U. S. Sup. Ct.) (abstract) 243
Union Auto Transp. Co., Re ..... (Ariz.) (abstract) 656
Union Electric Light & P. Co., Handelman v. ..... (Mo.) 94
Union Teleph. Co., Re ..... (Neb.) (abstract) 286
Union Teleph. Co., Re ..... (Wis.) (abstract) 588
United Electric R. Co., Re ..... (R. I.) (abstract) 851
United Fuel Gas Co. v. Kentucky R. Commission (U. S. Dist. Ct.) (abstract) 84
United Fuel Gas Co. v. Kentucky R. Commission (2 cases) (U. S. Dist. Ct.) (abstract) 500
United Fuel Gas Co. v. Kentucky R. Commission (U. S. Dist. Ct.) (abstract) 589
United New Jersey R. & Canal Co., Harrison v. ..... (N. J. Ch.) 735
United Parcel Service, Anderson v. ..... (Cal.) 265
United R. Co., Re ..... (Mo.) 202
United Stages, Re (2 cases) ..... (Cal.) (abstract) 653
United States, Kansas City Southern R. Co. v. (U. S. Dist. Ct.) (abstract) 77
United States, Kansas City Southern R. Co. v. (U. S. Dist. Ct.) (abstract) 79
United States v. Northern P. R. Co. .... (U. S. Dist. Ct.) (abstract) 92

United States, St. Louis & O'Fallon R. Co. v. ..... (U. S. Dist. Ct.) 740
United Teleph. Co., Re ..... (Ind.) (abstract) 517
United Teleph. Co., Re ..... (Ind.) (abstract) 543
Utah Light & Traction Co., Re ..... (Utah) (abstract) 599
Vaughn, Re ..... (Colo.) (abstract) 109
Villia, Griffon v. ..... (La.) (abstract) 652
Vinyard, Re ..... (Colo.) (abstract) 108
Wacker, Re ..... (Colo.) (abstract) 767
Walker, Re ..... (Colo.) (abstract) 767
Walker, Barbour v. ..... (Okla. Sup. Ct.) 623
Warden, Citizens' Gas & Fuel Co. v. .... (Ind. App. Ct.) (abstract) 590
Warren Co. v. Maine C. R. Co. ..... (Me. Sup. Ct.) (abstract) 544
Washington Motor Coach Co. v. West .... (Md. Cir. Ct.) (abstract) 498
Washington Water Power Co., Department of Public Works ex rel. Patrons v. ..... (Wash.) 122
Water Department of East Chicago, Re ..... (Ind.) (abstract) 852
Webb, Rinebold v. ..... (Pa.) 604
Welch, Re ..... (Colo.) (abstract) 776
Wendel v. American R. Express Co. ..... (Mont.) (abstract) 282
Westby Teleph. Co., Re ..... (Wis.) 610
Western Motor Transport Co., San Francisco, N. & C. R. Co. v. (Cal.) (abstract) 105
Western Slope Motor Way, Re ..... (Colo.) 32
West Jersey & Seashore R. Co., Re ..... (N. J.) 696
West Side Transit Co., Re (2 cases) ..... (Mich.) (abstract) 245
West, Washington Motor Coach Co. v. .... (Md. Cir. Ct.) (abstract) 498
Wharton & N. R. Co., Board of Education of Rockaway v. (N. J.) (abstract) 598
Wheeling Traction Co. v. Public Utilities Commission. See Ohio Valley Transit Co. v. Public Utilities Commission 404
White Motor Express Co., Re ..... (Colo.) 771
Wiggin, Gilchrist v. ..... (N. Y. Sup. Ct. Sp. T.) 381
Will, Re ..... (Colo.) (abstract) 776
Wilson, Re ..... (Colo.) (abstract) 776
Wilson v. Prairie Teleph. Co. ..... (Ind.) (abstract) 850
Winn, Re ..... (Mo.) (abstract) 107
Winn, Re ..... (Mo.) (abstract) 108
Wisconsin Highway Commission, Re ..... (Wis.) (abstract) 324
Wisconsin Power & Light Co., Beaver Dam v. .... (Wis.) (abstract) 83
Wisconsin Teleph. Co., Re ..... (Wis.) (abstract) 81
Wisconsin Teleph. Co., Re ..... (Wis.) (abstract) 544
Wisconsin Teleph. Co., Coolidge v. ..... (Wis.) (abstract) 856
Wisconsin Teleph. Co., Farmers Teleph. Co. v. ..... (Wis.) 486
Worrell, Re ..... (Mo.) 793
Yale Teleph. Co., Re ..... (Okla.) (abstract) 78
YellowaY, Re ..... (Mo.) 217
Yellow Cab Co., Re ..... (Colo.) (abstract) 767
Yonkers Bus Service, Re ..... (N. Y.) 187
Yorktown Water Works Co., Re ..... (Ind.) (abstract) 282

TABLE OF CASES BY JURISDICTIONS.

See also lists of Appeals, Rehearings, and Modifications, post, p. xlviii.

COURT CASES.

United States Circuit Court of Appeals.

Backus-Brooks Co. v. Northern P. R. Co. (abstract) 233
Backus-Brooks Co. v. Northern P. R. Co. (abstract) 235
Backus-Brooks Co. v. Northern P. R. Co. (abstract) 280
Backus-Brooks Co. v. Northern P. R. Co. (2 cases) (abstract) 281
Dayton v. City R. Co. (3 cases) (abstract) 500
Gallardo v. Porto Rico R. Light & P. Co. (abstract) 498
Temmer v. Denver Tramway Co. (abtract) 76

United States District Court.

Kansas City S. R. Co. v. United States (abstract) 77
Kansas City S. R. Co. v. United States (abstract) 79
St. Louis & O'Fallon R. Co. v. United States 740
Standard Oil Co. v. Hall (2 cases) (abstract) 501
United Fuel Gas Co. v. Kentucky R. Commission (abstract) 84
United Fuel Gas Co. v. Kentucky R. Commission (2 cases) (abstract) 500
United Fuel Gas Co. v. Kentucky R. Commission (abstract) 589
United States v. Northern P. R. Co. (abstract) 92

United States Supreme Court.

Hammond v. Farina Bus Line & Transp. Co. 382
Hammond v. Schappi Bus Line 388
Tyson & Brother v. Banton (2 cases) (abstract) 243

Alabama Supreme Court.

Compton v. Alabama Power Co. 724

Arizona Supreme Court.

State v. Smith (abstract) 245

California Supreme Court.

Sutter-Butte Canal Co. v. Railroad Commission 811

Colorado Supreme Court.

Public Service Co. v. Loveland (abstract) 82

Florida Supreme Court.

State ex rel. Burr v. Seaboard Air Line R. Co. (abstract) 139
State ex rel. Burr v. Seaboard Air Line R. Co. (abstract) 499

Georgia Court of Appeals.

Lumberman's Co. v. Seaboard Air Line R. Co. (abstract) 283

Georgia Supreme Court.

Tift v. Atlantic Coast Line R. Co. (abstract) 245
Tift v. Atlantic Coast Line R. Co. (abstract) 499

Illinois Supreme Court.

Roy v. Illinois Commerce Commission ex rel. North Shore Connecting R. Co. (2 cases) (abstract) 107
Roy v. Illinois Commerce Commission ex rel. North Shore Connecting R. Co. (abstract) 139

Indiana Appellate Court.

Citizens' Gas & Fuel Co. v. Warden (abstract) 590

Indiana Supreme Court.

Denny v. Muncie (abstract) 501

Iowa Supreme Court.

Red Top Cab Co. v. McGlashing (abstract) 91
Sac City v. Iowa Light, Heat & P. Co. (2 cases) (abstract) 151

Kansas Supreme Court.

Atchison, T. & S. F. R. Co. v. State Highway Commission 326
Missouri P. R. Co. v. Red Star Milling Co. (abstract) 283

Kentucky Court of Appeals.

Cooper v. McWilliams & Robinson 731
Harrison v. Big Four Bus Lines (3 cases) (abstract) 502

Louisiana Supreme Court.

Crowell & Spencer Lumber Co. v. Louisiana Pub. Service Commission (abstract) 140

Maine Supreme Court.

Warren Co. v. Maine C. R. Co. (abstract) 544

Maryland Circuit Court.

Washington Motor Coach Co. v. West (abstract) 498

Maryland Traffic Court.

Maryland v. Rubin (abstract) 245

Michigan Supreme Court.

Red Star Drivers' Asso. v. Detroit (abstract) 502

Minnesota Supreme Court.

State v. Lefebvre 14

Mississippi Supreme Court.

Carnaggio Bros. v. Greenwood (abstract) 588

Missouri Supreme Court.

Canary Taxicab Co. v. Terminal R. Asso. (abstract) 89

Chicago, R. I. & P. R. Co. v. Public Service Commission (5 cases) (abstract) 323
State ex rel. Campbell Iron Co. v. Public Service Commission 17
State ex rel. Missouri P. R. Co. v. Public Service Commission 615
State ex rel. Wabash R. Co. v. Public Service Commission 490

New Brunswick Supreme Court.

King v. Trueman (abstract) 76

New Jersey Court of Chancery.

Harrison v. United New Jersey R. & Canal Co. 735

New Jersey Supreme Court.

Rahway Valley R. Co. v. Public Utility Comrs. 135

New Mexico Supreme Court.

Asplund v. Santa Fe (abstract) 150

New York Appellate Division.

East 238th Street, Re (abstract) 499

New York Supreme Court.

Colonial Motor Coach Corp. v. Oswego (abstract) 150
Gilchrist v. Dahl 336
Gilchrist v. Wiggin 381
Mamaroneck v. New York Interurban Water Co. (abstract) 500
Niagara, L. & O. Power Co. v. Seneca Iron & Steel Co. (2 cases) (abstract) 282
Niagara, L. & O. Power Co. v. Seneca Iron & Steel Co. (abstract) 500
Rapid Transit Subway Construction Co. v. New York (4 cases) (abstract) 234

Ohio Court of Appeals.

Stone v. Osborn 25

Ohio Supreme Court.

Cooper Bus Co. v. Public Utilities Commission 738
Lykins v. Public Utilities Commission (abstract) 110
Lykins v. Public Utilities Commission (abstract) 139
Lykins v. Public Utilities Commission 396
Ohio Valley Transit Co. v. Public Utilities Commission 404
Ramsey v. Public Utilities Commission (2 cases) (abstract) 112
Southern Ohio Pub. Service Co. v. Public Utilities Commission (abstract) 112
Southern Ohio Pub. Service Co. v. Public Utilities Commission (abstract) 236

Oklahoma Supreme Court.

Barbour v. Walker 623
Bromide Crushed Rock Co. v. Dolese Bros. Co. 139
Chicago, R. I. & P. R. Co. v. State (abstract) 140
Chicago, R. I. & P. R. Co. v. State 285
Huffaker v. Fairfax (abstract) 151

Kansas, O. & Gulf R. Co. v. State 825
St. Louis-S. F. R. Co. v. State (abstract) 499

Rhode Island Supreme Court.

Public Utilities Commission v. East Providence Water Co. 141
Public Utilities Commission v. East Providence Water Co. 144

Vermont Supreme Court.

Royalton v. Central Vermont R. Co. 633

Virginia Court of Appeals.

Norfolk & W. R. Co. v. Com. ex rel. State Corp. Commission 397

Virginia Special Court of Appeals.

Etheredge v. Norfolk 409

Washington Supreme Court.

Dryden Commercial Club v. Department of Public Works (abstract) .. 140
Northern P. R. Co. v. Department of Public Works (abstract) 425
State ex rel. Byram v. Department of Public Works 421

West Virginia Supreme Court of Appeals.

Marmet Gas Co. v. Marmet (abstract) 151

Wisconsin Supreme Court.

Chicago, M. & St. P. R. Co. v. Railroad Commission 502
Hudson v. Railroad Commission (abstract) 140
Muscoda Bridge Co. v. Muscoda 146

COMMISSION CASES.

Arizona.

Arizona Transp. Co., Re (abstract) 599
Atchison, T. & S. F. R. Co., Re (abstract) 321
Atchison, T. & S. F. R. Co., Re (abstract) 323
Atchison, T. & S. F. R. Co., Re (abstract) 846
Southern P. Co., Re (abstract) 597
Union Auto Transp. Co., Re (abstract) 656

California.

Anderson v. United Parcel Service 265
Auto Transit Co. v. Pickwick Stages (abstract) 110
Ayres-Whiteside Transp. Co., Re (abstract) 108
Bay and River Boat Owners' Asso. v. Frodsham 173
California Transit Co., Re (abstract) 106
California Transit Co. v. Scott 385
Central Mendocino County Power Co., Re (abstract) 516
Central Mendocino County Power Co., Re (abstract) 518
Clear Lake Water Co., Re (abstract) 516
Coast Counties Gas & E. Co., Re (abstract) 517
Dearborn, Re (abstract) 283

Fort Bragg Electric Co., Re (abstract) 516
Fresno Traction Co., Re 167
Key System Transit Co., Re (abstract) 109
Leatherman v. Consolidated Water & Development Co. (abstract) 588
Municipal League v. Southern P. Co. 152
Neklason v. Ratterree Bros. (abstract) 601
Overall, Re (abstract) 111
Pacific States Butter, Eggs, Cheese & Poultry Asso. v. Southern P. Co. (abstract) 283
Pioneer Truck & Transfer Co., Re (abstract) 516
San Francisco, N. & C. R. Co. v. Western Motor Transport Co. (abstract) 105
Southern P. Co., Re (abstract) 598
Susanville Water Co., Re (abstract) 590
Sutter-Butte Canal Co., Re (abstract) 517
Sutter-Butte Canal Co., Re (abstract) 590
Tracy Gas Co., Re 512
United Stages, Re (2 cases) (abstract) 653

Canada.

Bell Teleph. Co., Re (abstract) 235

Colorado.

Armstead, Re (abstract) 767
Beals, Re (abstract) 767
Bensberg, Re (abstract) 106
Bill's Sightseeing Co., Re 775
Brandhorst, Re (abstract) 767
Bressan, Re (abstract) 106
Bus Transportation Co., Re 645
Butterbaugh, Re 41
Clark, Re (abstract) 767
Clark, Re (abstract) 776
Clear Creek Power & Develop. Co. v. Public Service Commission 506
Collins, Re (abstract) 767
Colorado Motor Way, Re (abstract) 859
Colorado Utilities Corp., Re (abstract) 111
Cook, Re (abstract) 767
Cook, Re (abstract) 776
Cornhusker Stage Lines, Re 175
Denver & Leadville Stage, Re 41
Dunning, Re (abstract) 767
Fain, Re (abstract) 767
Fain, Re (abstract) 776
Giacomelli Brothers, Re 425
Gordon, Re (abstract) 767
Grant, Re (abstract) 767
Gribble, Re (abstract) 767
Gribble, Re (abstract) 776
Hailey, Re (abstract) 767
Hall, Re (abstract) 654

Hall, Re (abstract) 767
Harris, Re (abstract) 767
Harriss, Re (abstract) 109
Heter, Re (abstract) 767
Heter, Re (abstract) 776
Hoepner, Re (abstract) 767
Hubman, Re (abstract) 776
Kidd, Re 771
Lepel, Re (abstract) 767
Lilley, Re 184
McGlochlin, Re (abstract) 776
Madison, Re (abstract) 767
Madison, Re (abstract) 776
Meeker-Rangely Stage Line, Re (abstract) 776
Montezuma County Teleph. Co., Re 518
Mosman, Re (abstract) 776
Muscati, Re 764
Nuttall, Re (abstract) 767
Nuttall, Re (abstract) 776
Padgett, Re (abstract) 776
Paradox Land & Transport Co., Re 648
Parker, Re (abstract) 767
Parker, Re (abstract) 776
Pike's Peak Consol. Fuel Co. v. Denver & R. G. W. R. Co. 768
Public Service Co., Re (abstract) 105
Public Service Co., Re (abstract) 106
Puett, Re (abstract) 776
Rice, Re (abstract) 767
Rice, Re (abstract) 776
Rule 18 Regulating Heating Value of Gas, Re 657
Sandoval, Re (abstract) 106
Schwilke, Re (abstract) 655
Seven Falls Co., Re (abstract) 767
Spradling, Re (abstract) 767
Stanley Power Co., Re 527
Taylor, Re (abstract) 767
Townsend, Re 175
Townsend, Re (abstract) 767
Tripp, Re (abstract) 108
Vaughn, Re (abstract) 109
Vinyard, Re (abstract) 108
Wacker, Re (abstract) 767
Walker, Re (abstract) 767
Welch, Re (abstract) 776
Western Slope Motor Way, Re 32
White Motor Express Co., Re 771
Will, Re (abstract) 776
Wilson, Re (abstract) 776
Yellow Cab Co., Re (abstract) 767

XUM

Connecticut.

Bridgeport Hydraulic Co., Re (abstract) 80
Eastern Connecticut Power Co., Re (abstract) 78
New York, N. H. & H. R. Co., Re (abstract) 106

District of Columbia.

Anacostia Citizens' Asso., Re (abstract) 600

Florida.

Southern Bell Teleph. & Teleg. Co., Re (abstract) 285

Georgia.

Georgia Power Co., Re 830

Idaho.

Codd & Allen Lumber Co. v. McGoldrick Lumber Co. 545
Codd v. McGoldrick Lumber Co. 545
Hansen v. Oregon Short Line R. Co. (abstract) 325
Mountain States Teleph. & Teleg. Co., Re 269

Illinois.

Bunker Hill Teleph. Co., Re (abstract) 93
Bunker Hill Teleph. Co., Re (abstract) 589
Chicago & J. Transp. Co., Re (abstract) 107
Chicago Motor Coach Co., Re (abstract) 109
Chicago Motor Coach Co., Re 564
Cleveland, C. C. & St. L. R. Co., Re (abstract) 90
Cleveland, C. C. & St. L. R. Co., Re (abstract) 859
Daly v. Chicago, B. & Q. R. Co. 661
East St. Louis & I. Water Co., Re 57
Egyptian Transp. System, Re 43
Elgin, B. & Rockford R. Co., Re (abstract) 653
Illinois C. R. Co., Re (abstract) 857
Illinois C. R. Co., Re (abstract) 859
Illinois Light & P. Co., Re (abstract) 112
Illinois Power & Light Corp., Re 776
Industry Teleph. Co., Re 435
Kankakee-Gilman Bus Line, Re (abstract) 107
McCoy v. Illinois Southern Teleph. Co. (abstract) 590
Maroa Electric Light Co., Re 776
Mayer v. Illinois Northern Utilities Co. 529
Moline Consumers Co. v. Chicago, R. I. & P. R. Co. (abstract) 281
National Stone Co. v. Chicago, M. & St. P. R. Co. (abstract) 90
Tri City R. Co., Re (abstract) 849

Indiana.

A. & M. Teleph. Co., Re (abstract) 285
Blue & Gray Bus Line v. Terre Haute 534
Brotherhood of Locomotive Engineers v. All Railroads 668
Brotherhood of Locomotive Firemen and Enginemen v. All Railroads 844

Cartersburg Teleph. Co., Re (abstract) 93
Crawford & Son, Re (abstract) 656
Elkhart, Re (abstract) 589
Elkhart, Re (abstract) 590
Gregg v. Terre Haute 534
Home Teleph. Co., Re 445
Hoosier Transp. Co. v. Terre Haute 534
Indiana Electric Corp., Re (abstract) 517
Indianapolis Street R. Co., Re 670
Indiana Service Corp., Re 531
Interstate Pub. Service Co., Re (abstract) 850
Madison Light & P. Co., Re 847
Municipal Water Plant, Re (abstract) 860
New Lebanon Teleph. Co., Re (abstract) 286
Northern Indiana Power Co., Re 273
Northern Indiana Power Co., Re (abstract) 517
Northern Indiana Pub. Service Co., Re (abstract) 80
Northern Indiana Pub. Service Co., Re (abstract) 84
Northern Indiana Pub. Service Co., Re (abstract) 517
Old Trails Express Co. v. Brazil 440
Pennsylvania R. Co., Re (abstract) 858
Raisor, Re (abstract) 112
Rossville Home Teleph. Co., Re (abstract) 590
Rountree v. Indianapolis Street R. Co. 85
Rushville Co-op. Teleph. Co., Re (abstract) 93
Spencer-Martinsville Motor Line, Re (abstract) 112
Thompson v. Indianapolis Street R. Co. (abstract) 597
Tocsin Teleph. Co., Re (abstract) 589
United Teleph. Co., Re (abstract) 517
United Teleph. Co., Re (abstract) 543
Water Department of East Chicago, Re (abstract) 852
Wilson v. Prairie Teleph. Co. (abstract) 850
Yorktown Water Works Co., Re (abstract) 282

Kansas.

Patrons v. Coffey County Teleph. Co. (abstract) 851

Louisiana.

Griffon v. Villa (abstract) 652
Shreveport Chamber of Commerce v. Kansas City S. R. Co. (abstract) 851
Shreveport Chamber of Commerce v. Railroads (abstract) 851

Maine.

Andover Water Co., Re (abstract) 236
Dixfield Light & Water Co. v. Itself (abstract) 78
Dixfield Light & Water Co. v. Itself (abstract) 84
Maine C. R. Co., Re (abstract) 325
Parker v. Central Maine Power Co. 852
Prescott v. Camden & Rockland Water Co. (abstract) 234

XUM

Prescott v. Camden & Rockland Water Co. (abstract) 588
Prescott v. Camden & Rockland Water Co. (abstract) 591

Massachusetts.

Holyoke Street R. Co., Re 578

Michigan.

Benton Harbor-St. Joe R. & Light Co., Re (abstract) 151
Cadillac-Soo Lumber Co. v. Duluth, S. S. & A. R. Co. 539
Menominee & M. Light & Traction Co., Re 87
Michigan Pub. Service Commission, Re (abstract) 589
Muskegon Traction & Lighting Co., Re (abstract) 282
Rogers, Re 781
Shiawassee Teleph. Co., Re (abstract) 589
West Side Transit Co., Re (2 cases) (abstract) 245

Minnesota.

Chicago, M. & St. P. R. Co., Re (abstract) 325
Home Teleph. Co., Re (abstract) 286
Lake Shore, Re (abstract) 245
Moede v. Chicago, M. & St. P. R. Co. 785

Missouri.

Bucklin Teleph. Exch., Re (abstract) 286
Capitol Stage Lines Co., Re 677
Dexter v. Missouri P. R. Co. (abstract) 321
Eternit and Chicago, B. & Q. R. Co., Re (abstract) 846
Handelman v. Union Electric Light & P. Co. 94
Ideal Teleph. Co., Re (abstract) 544
Kansas City Pub. Service Co., Re 582
Kansas City Teleph. Co., Re (abstract) 591
Kendrick v. Austin-Inland Teleph. Co. (abstract) 234
Laddonia Rural Teleph. Co., Re (abstract) 544
Manufacturers R. Co., Re (abstract) 322
Missouri Power & Light Co., Re (abstract) 597
Missouri Transit Co., Re (abstract) 860
Purple Swan Safety Coach Lines, Re 193
Rolla Teleph. Co., Re (abstract) 80
St. Joseph R. Light, Heat & P. Co., Re (abstract) 325
Springfield Gas & E. Co., Re (abstract) 852
Springfield Traction Co., Re 675
State Highway Commission v. County Court (abstract) 323
Stoddard County v. St. Louis-S. F. R. Co. 788
Troy Teleph. Co., Re (abstract) 500
United R. Co., Re 202
Winn, Re (abstract) 107
Winn, Re (abstract) 108
Worrell, Re 793
YellowaY. Re 217

Montana.

County Comrs. of Flathead County v. Great Northern R. Co. 457
Glacier National Park Transport Co., Re (abstract) 654
Glacier National Park Transport Co., Re (abstract) 657
Howe & Holt Transfer Co., Re (abstract) 860
Merrifield v. Mountain States Power Co. 798
Wendel v. American R. Express Co. (abstract) 282

Nebraska.

Citizens Teleph. Co., Re (abstract) 600
Citizens Teleph. Co. v. Sutherland Teleph. Co. (abstract) 93
Clay County v. Chicago, B. & Q. R. Co. ..... (abstract) 501
Cotner Bus Line, Re 686
Dowling v. Chicago & N. W. Co. ..... (abstract) 326
Dundy County Mut. Teleph. Co., Re ..... (abstract) 516
Hedlund v. Dalton Teleph. Exch. ..... (abstract) 600
Interstate Teleph. Co., Re 587
Lincoln-Nebraska City Coach Line, Re ..... (abstract) 597
Lincoln Traction Co., Re 861
Nuckolls County Independent Teleph. Co., Re ..... (abstract) 516
Nuckolls County Independent Teleph. Co., Re ..... (abstract) 518
Omaha & C. B. R. & Bridge Co., Re 689
Union Teleph. Co., Re ..... (abstract) 286

New Hampshire.

Selectmen of Lyndeborough v. Boston & M. R. Co. ..... (abstract) 858

New Jersey.

Bellanca v. Middlesex Water Co. 591
Board of Education of Rockaway v. Wharton & N. R. Co. .. (abstract) 598
Choate, Re 98
Harrison, Re (2 cases) ..... (abstract) 322
Jersey City-Greenwood Lake Bus Co., Re ..... (abstract) 107
Lakewood Water Co., Re 705
Leonia v. New Jersey & H. R. R. & Ferry Co. 464
Morris County Traction Co., Re 98
Mountain Water Service Co., Re ..... (abstract) 75
Mountain Water Service Co., Re ..... (abstract) 82
Mountain Water Service Co., Re 287
New York Teleph. Co., Re ..... (abstract) 93
Pennsylvania R. Co., Re 594
Seaboard By-Product Coke Co. v. Atlantic City R. Co. .... (abstract) 92
Seaboard By-Product Coke Co. v. Atlantic City R. Co. .... (abstract) 283
Seaboard By-Product Coke Co. v. Atlantic City R. Co. .... (abstract) 600
West Jersey & Seashore R. Co., Re 696

New York.

Chalmers, Re 332
Geneva, S. F. & A. R. Co., Re ..... (abstract) 598
Hudson Valley R. Co., Re 1

XUM

Second Avenue R. Co., Re 332
Staten Island Rapid Transit R. Co., Re ..... (abstract) 544
Tostanoski, Re 187
Yonkers Bus Service, Re 187

North Carolina.

Southern Bell Teleph. & Teleg. Co., Re ..... (abstract) 286

North Dakota.

Farmers Elevator Co., Re 469
Hughes Electric Co., Re 601
Starkweather v. Northern Utilities Corp. 699

Ohio.

Bucyrus Teleph. Co., Re ..... (abstract) 84
Sidney Teleph. Co., Re ..... (abstract) 84

Oklahoma.

Southwestern Bell Teleph. Co., Re ..... (abstract) 852
Southwestern Bell Teleph. Co. v. Milburn Teleph. Co. .... (abstract) 591
Yale Teleph. Co., Re ..... (abstract) 78

Oregon.

Idaho Power Co., Re 113
Motor Vehicle Freight Classification, Re ..... (abstract) 90

Pennsylvania.

Ashton v. Northern Pennsylvania Power Co. 236
Brubaker & Bros. v. Millersburg Home Water Co. 808
Brubaker v. Millersburg Home Water Co. (2 cases) ..... (abstract) 80
Brubaker v. Millersburg Home Water Co. (2 cases) ..... (abstract) 82
Brubaker v. Millersburg Home Water Co. ..... (abstract) 83
Brubaker v. Millersburg Home Water Co. ..... (abstract) 84
Carnahan Valley R. Co., Re ..... (abstract) 322
Corson, Re ..... (abstract) 111
Daniels Taxi & Transfer Co., Re (2 cases) ..... (abstract) 110
Davison & Brother v. Pennsylvania R. Co. ..... (abstract) 92
Department of Highways v. Pennsylvania R. Co. ..... (abstract) 324
Evert v. Kulpmont Water Co. ..... (abstract) 94
Guerin, Re 709
Hall v. Clarks Summit Water Co. ..... (abstract) 79
Hall v. Clarks Summit Water Co. (2 cases) ..... (abstract) 81
Hall v. Clarks Summit Water Co. ..... (abstract) 84
Harlacker v. Adams Transit Co. 12
Johnsonburg R. Co., Re ..... (abstract) 598
Kirwan Taxi Co. v. Webb 604

Kittanning v. Armstrong Water Co. (3 cases) ..... (abstract) 81
Kittanning v. Armstrong Water Co. (2 cases) ..... (abstract) 82
Kittanning v. Armstrong Water Co. (3 cases) ..... (abstract) 83
Kittanning v. Armstrong Water Co. ..... (abstract) 84
Lehigh Traction Co. v. Collins ..... (abstract) 111
Lehigh Traction Co. v. Motor Transp. Co. 804
Lehigh Valley Transit Co. v. Erb 606
Merchants Asso. of Shenandoah v. Schuylkill R. Co. ..... (abstract) 81
Merchants Asso. of Shenandoah v. Schuylkill R. Co. ..... (abstract) 83
Mt. Gretna Brownstone Co. v. Pennsylvania R. Co. ..... (abstract) 284
Philadelphia Rural Transit Co., Re ..... (abstract) 655
Philadelphia Rural Transit Co., Re ..... (abstract) 656
Rinebold v. Webb 604
Shaver v. Shavertown Water Co. ..... (abstract) 81
Shaver v. Shavertown Water Co. ..... (abstract) 84
Tioga County Bell Teleph. Co. v. Citizens' Mut. Teleph. & Teleg. Co. 712

Rhode Island.

Inter-City Coach Co., Re ..... (abstract) 657
Labelle, Re 474
United Electric R. Co., Re ..... (abstract) 851

South Dakota.

Craig, Re ..... (abstract) 110
Greyhound Co., Re 239
Griffin, Re (2 cases) ..... (abstract) 244
Griffin, Re ..... (abstract) 499
Griffin, Re ..... (abstract) 500
Lewis, Re 246
Mitchell Chamber of Commerce v. Chicago, M. & St. P. R. Co. (abstract) 284
Mound City & Eastern R. Co., Re ..... (abstract) 654
Powell, Re 475

Utah.

Bamberger Electric R. Co., Re 116
Denver & R. G. W. R. Co., Re ..... (abstract) 858
Utah Light & Traction Co., Re ..... (abstract) 599

Virginia.

Com. ex rel. Richmond v. Richmond, F. & P. R. Co. 291

Washington.

Columbia Gorge Motor Coach System, Re 119
Department of Public Works ex rel. Patrons v. Washington Water Power Co. 122

Montesano v. Montesano Teleph. Co. ..... (abstract) 83
Trowbridge, Re ..... (abstract) 110

West Virginia.

Barboursville Water & Light Co., Re ..... (abstract) 500

Wisconsin.

Barron County Teleph. Co., Re ..... (abstract) 544
Beaver Dam v. Wisconsin Power & Light Co. ..... (abstract) 83
Bergen Teleph. Co., Re 129
Coolidge v. Wisconsin Teleph. Co. ..... (abstract) 856
Cudahy Bros. Co., Re (2 cases) ..... (abstract) 79
Cudahy Bros. Co., Re (2 cases) ..... (abstract) 83
Eagle River Light & Water Commission, Re ..... (abstract) 591
Farmers Teleph. Co. v. Wisconsin Teleph. Co. 486
Green Bay & W. R. Co., Re (3 cases) ..... (abstract) 284
Isaacson, Re ..... (abstract) 656
Kenosha Sand & Gravel Co. v. Chicago & N. W. R. Co. (3 cases) (abstract) 94
Kenosha Sand & Gravel Co. v. Chicago & N. W. R. Co. .... (abstract) 234
La Crosse, Re ..... (abstract) 287
Lake v. Milwaukee ..... (abstract) 857
Lodi Teleph. Co., Re ..... (abstract) 600
Minneapolis, St. P. & S. S. M. R. Co. v. Green Bay & W. R. Co. (abstract) 326
North-West Teleph. Co., Re ..... (abstract) 286
North-West Teleph. Co., Re 480
Perry-Hollandale Teleph. Co., Re ..... (abstract) 280
Prentice Mut. Teleph. Co., Re 613
Racine v. Chicago & N. W. R. Co. ..... (abstract) 324
Rules and Regulations Governing Electric Lines, Re 716
St. Croix Valley Teleph. Co., Re 131
Stange Lumber Co. v. Chicago M. & St. P. R. Co. 721
State Teleph. Co., Re 249
Union Teleph. Co., Re ..... (abstract) 588
Westby Teleph. Co., Re 610
Wisconsin Highway Commission, Re ..... (abstract) 324
Wisconsin Teleph. Co., Re ..... (abstract) 81
Wisconsin Teleph. Co., Re ..... (abstract) 544

LIST OF APPEALS, REHEARINGS, AND MODIFICATIONS.

Illinois.

Re Chicago Motor Coach Co., P.U.R.1928A, p. 564.
Order amended to make provisions more definite and certain (August 9, 1927).

Re Illinois Northern Utilities Co. P.U.R.1928A, p. 529.
Former order set aside, complaint as to rates for electric refrigerators dismissed, and company authorized to serve domestic electric refrigerators under rate schedule available for general domestic electric service (February 8, 1928).

Missouri.

Lee's Summit v. Independence Water Works Co., P.U.R.1928B, p. 193.
Order modified by omitting provision for future needs and demands of the city of Lee's Summit for water, and the insertion of a provision for service to meet the needs and demands of the inhabitants (February 17, 1928).

Mohen v. Union Electric Light & P. Co., P.U.R.1924E, p. 216.
Connection of additional consumers ordered upon stipulated terms (March 19, 1928).

Pennsylvania.

Knoxville v. South Pittsburgh Water Co. P.U.R.1928B, p. 204.
Applications for rehearing dismissed (February 21, 1928).

XUM

PUBLIC UTILITIES REPORTS

NEW YORK DEPARTMENT OF PUBLIC SERVICE STATE DIVISION. PUBLIC SERVICE COMMISSION.

RE HUDSON VALLEY RAILWAY COMPANY.

[Case No. 3489.]

Service* — *Reduction of schedule affecting revenue* — *Railways.

1. By reason of loss of patronage likely to result from impaired service the Commission did not believe a reduction in scheduled interurban railway cars to one every two hours would sustain sufficient revenue to warrant the action, p. 4.

Service* — *Abandonment* — *Evidence of public necessity* — *Railway.

2. The absence of public necessity for a less profitable route of an interurban system operating as a whole at a loss may be presumed from the inadequacy of revenue derived from patronage to maintain the service, p. 4.

Service* — *Abandonment* — *Opportunity for adjustment* — *Railways.

3. Approved discontinuance of the least profitable line of an interurban system, operating as a whole at a loss, should not be enforced abruptly but only after such a lapse of time as will enable changed conditions to be met and opportunity for substitute means of transportation to be established if patronage be sufficient to attract the same, p. 8.

Service* — *Abandonment* — *Interurban railways.

Discussion of inadvisability of continuing an unprofitable branch line at the risk of total abandonment of service, p. 5.

Service* — *Abandonment* — *Program* — *Interurban railways.

Statement that where an interurban railway seems to be steadily abandoning its less lucrative lines, the Commission should not approve until it is acquainted with the full extent of the utility's plans and program, p. 11.

(LUNN, Commissioner, dissents.)

[August 17, 1927.]

PETITION for approval of a declaration of abandonment of certain interurban routes; petition granted to become effective January 1, 1928.

Appearances: James McPhillips, Glens Falls, and C. E. Fitzgerald, Glens Falls, as attorneys for petitioner, with H. T. Newcomb, New York city, of counsel; Ernest Murphy, Albany, as general manager of petitioner; A. V. Louer, Glens Falls, assistant general manager of petitioner; Joseph A. Kellogg, New York city, as attorney for the village of Greenwich, Greenwich Citizens Committee and Greenwich Chamber of Commerce; Harry L. Russell, Greenwich, attorney for village of Greenwich; James S. Kiley, Glens Falls, as attorney for the town of Warrenburg; Frank W. Smith, Warrensburg, as supervisor of the town of Warrensburg; Thomas W. Smith, Warrensburg, as member of Town Board of town of Warrensburg; Harry A. Reoux, Warrensburg, as citizen interested; B. E. Murray, Warrensburg, as County Superintendent of Highways, Warren county; Edward T. Jones, and Louis Dunning, Warrensburg, as members of the Citizens Committee of Greenwich, and also representing Greenwich Chamber of Commerce; Wesley Duff, Greenwich, as president of village of Greenwich; J. A. Gillingham, Warrensburg, citizen interested.

Prendergast, Chairman:

Statement of Case.

By an order made in the above entitled matter on March 3, 1927, P.U.R.1927C, 326, the abandonments prayed for were denied. On April 7, 1927, a further order was made granting a rehearing. Such rehearings were held on April 20, May 10, and May 17, 1927, and they practically amounted to a retrial of the application; some 479 pages of oral testimony being taken, and 34 additional exhibits received.

Much time and attention has been devoted to an analysis of the testimony and exhibits, for the reason that in the memorandum of Commissioner Lunn upon the original application, the denial of petitioner's application rested partly upon a statement that petitioner had not made a clear and satisfactory case as to the financial results of operation of the Greenwich branch, and further (although it was conceded that the Lake George-War-

rensburg line did not pay) the precise amount and cause of that loss was held not to have been sufficiently or satisfactorily shown.

Operating Condition of Greenwich and Warrensburg Lines.

On rehearing, petitioner submitted evidence in great detail as to the present physical condition of the lines and the amounts necessary to be expended to put them into proper operating condition. The net cost, shown by Exhibit 28, of putting the line from Thompson to the beginning of the pavement in the village of Greenwich into safe operating condition amounts to $39,963.98. In Exhibit 29, the Warrensburg line to Lake George was shown to require the net expenditure of $23,624.54. The Witness Ferris, in Exhibit 30, estimated costs somewhat in excess of those previously set forth, amounting respectively to $40,357 and $23,964.32. It was further shown that to recondition the cars for the operation of the Greenwich branch would require $5,354.99, and similar expenditures on the Warrensburg branch would amount to $2,153.90. So that to rehabilitate these two lines would cost more than $70,000.

Revenues and Expenses.

Entire System.

On rehearing, petitioner presented statements of operating revenues, expenses, etc. covering the full year 1926, showing that the entire system, viz., Hudson Valley Railway Company, sustained an operating deficit for 1926, of $64,758.77.

Branch Lines.

The operating results on the two lines proposed to be abandoned were covered by several witnesses and a number of exhibits. The summary statements attached hereto show the results on the several bases submitted. In addition, we have prepared further statements, based on a complete analysis of the company's exhibits and its actual experience.

Whether or not there was satisfactory proof as to financial results of operation of these two lines, prior to the first determination and order, is of no moment, because it now exists. The attached schedules, show in comparative form, Schedule A, the revenues and expenses of the entire system, together with the revenues and expenses applicable to the operation of the Greenwich branch, as shown by petitioner and as claimed by the repre-

sentative of the village of Greenwich; Schedule B gives the allocations made by accountants of the Commission. The result of these allocations indicate an operating loss of $5,974.79 upon the Greenwich branch. If the company were to lose its present revenue from sale of power, such operating loss becomes $11,245.70.

Schedules C and D have been similarly prepared for the Warrensburg branch. Schedule C shows the company's allocation, and Schedule D those of the Commission's accountants. The result of the computation shows that for the year 1926 there was an operating loss of $13,492.55, after taking into consideration net receipts for power sold. If power sales are excluded, there is an operating loss on this branch of $13,618.57.

[1] The witness Jones, by Exhibit 60, attempted to show that an operating income of $1,480.85 would result if the Greenwich line was operated on a 2-hour schedule. In this exhibit, in addition to other assumptions and estimates not sustained by the company's actual experience, the witness assumed that on the 2-hourly schedule, revenues would be the same as at present. Is it fair and reasonable to believe that people would wait two hours for service? We do not think so. In fact, the company, several years ago, operated on such a 2-hour schedule, and revenues thereupon immediately decreased.

So the fact is, that the operation of the two lines sought to be abandoned results in financial loss, and that the operation of the entire system, including these two lines, also results in a loss. Further, there is nothing to indicate that future operation of the branch lines can result in anything except continued and perhaps greater financial loss to petitioner.

Public Convenience and Necessity.

[2] No disagreement is expressed with the statement of applicable law as set forth in Commissioner Lunn's memorandum. It was there stated that it was incumbent upon the petitioner to show, in order to establish its right to the proposed abandonment, that the lines sought to be abandoned are no longer necessary for the successful operation of its road, and further that they are no longer necessary for the convenience of the public. It may well be that financial loss alone upon a part of the system of a street

surface railroad is not enough to justify abandonment; and assuming this, then the other question remains: Are these lines longer necessary for the convenience of the public?

Can public convenience be argued from a patronage which results in loss? In other words, should a public service corporation be compelled indefinitely to continue operations which only result in the exhaustion of its assets? The courts have passed upon this many times.

In Iowa v. Old Colony Trust Co. 131 C. C. A. 581, 215 Fed. 307, 312, it was sought to abandon a portion of a road because of the continued financial loss incident to its operation. The Court says:

"Here is a case where the line sought to be abandoned is not only not self-supporting, but its continued operation jeopards the successful operation of the entire system of which it is merely a part. Moreover, its continued operation in its present condition is dangerous to life and property and there is no money or financial ability to improve its condition. Not only so, but there is little public necessity for its continued operation, whereas, there is a great public necessity for the continued operation of the balance of the system.

"In such circumstances the railroad company may abandon such an unprofitable . . . part of its road and neither the state nor unfortunate investors along the line can justly complain. They cannot force a railroad company to do the impossible."

To the same effect see: People v. Albany & Vermont R. Co. 24 N. Y. 261; Northern P. R. Co. v. North Dakota ex rel. McCue, 236 U. S. 585, 59 L. ed. 735, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, L.R.A.1917F, 1148, Ann. Cas. 1916A, 1; Norfolk & W. R. Co. v. West Virginia, 236 U. S. 605, 59 L. ed. 745, P.U.R.1915C, 293, 35 Sup. Ct. Rep. 437; Gilchrist v. Waycross Street R. Co. 246 Fed. 952; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; New York Trust Co. v. Buffalo & L. E. Traction Co. 112 Misc. 414, P.U.R. 1920F, 294, 183 N. Y. Supp. 278. (In this case the authorities are reviewed at length and the court holds that if a trolley line

has not received sufficient patronage to enable it to pay expenses, it should be ordered abandoned.)

The former Commission (P. S. C. 2d Dist.) held to the same effect in a number of cases:

Petition of Yonkers R. Co. under § 184, Railroad Law, for abandonment of portions of its route (19 N. Y. Off. Dept. R. 201, VIII P. S. C. R. (2d Dist. N. Y., 111, 113)), where it said: "Upon the facts shown there seems no doubt of the right of the petitioner to abandon the Hastings line. It seems superfluous to argue that under the circumstances, the company having given the road in question a fair trial and it not being needed for strategic purposes to reach other sections lying further to the north or east, and that it has never earned operating expenses, this portion of the road may fairly be considered no longer necessary for the successful operation of petitioner's system. As concerns convenience of the public, it can hardly be claimed that public convenience can be a defense to the abandonment unless the contribution which the public makes to the support of the road will pay operating expenses and some reasonable return on investment."

Petition of International R. Co. under § 184, Railroad Law, for abandonment of a portion of its road in the city of Lockport (21 N. Y. Off. Dept. R. 4) where it said: "Upon the facts shown I think it can be claimed within the meaning of the statute that the operation of the track in question is longer necessary for the convenience of the public. As before intimated, every section of track, wherever located, which is operated at all, is probably convenient for some number of patrons; but as stated by the Commission in the Yonkers case (*supra*) public convenience cannot be predicated upon a public patronage which fails to give reasonable financial support to the operation of the road. Of course there may be circumstances under which abandonment of an unprofitable segment or branch of railroad would not be justified purely on the ground that the particular piece of track was not self-supporting, and there are undoubtedly factors other than that of financial support of the particular track proposed to be abandoned which might prove to be controlling in a particular case. But where, as in this case, the ensuing inconvenience to

patrons is so slight, and it is proved that the operation not only of the track in question but of both the Lockport local lines and the Lockport and Olcott branch of the main system in connection with which this track is operated, are unprofitable, we think a clear case has been made out. . . ."

Petition of Chautauqua Traction Co. under § 184, Railroad Law, for abandonment of a portion of its route in the incorporated village of Westport (22 N. Y. Off. Dept. R. 368), where it was said at page 370: "Naturally, abandonment is opposed by those persons who patronize the branch and to whom, we must infer, it is a great convenience. . . . Of course every railroad which is patronized at all is a great convenience to those who make use of it; but public convenience cannot be predicated upon a use which constantly falls far short of affording reasonable financial support. In this case a fair trial has been given the enterprise, with no result but heavy financial loss and no prospect of improvement in the future . . . the prayer of the petitioner should be granted." (P.U.R.1920C, 169, 171, 174.)

It was stated in the first memorandum in this proceeding:

"The residents of Warrensburg virtually contend that their need for service is so great that it would be better to continue this line and risk the ultimate abandonment of the entire system rather than to leave them without any transportation facilities." (P.U.R.1927C, at p. 338.)

This is a rather narrow view, and ought not to have support here. If these branch lines are necessary for the service of the public, that fact would be demonstrated in the amount of patronage which they receive.

Is there any prospect for increased future patronage? Witnesses for those opposing the abandonment say:

One, that there is a State College of Forestry being established 3½ miles north of Warrensburg and that during the summer there will be a large attendance. Another witness says that 6 miles north of Warrensburg on Tripp lake there is a large summer camp running from June to September; that another such camp is on what is known as Echo lake; but further testified that those going to the camp generally arrive at Lake George on the Delaware and Hudson and make the trip from there by automobile. When asked whether 99 per cent of such

persons did not come in their own automobiles, the witness could only answer, "I don't observe all of them."

It was stated in the former memorandum that if the economies recommended by the opposition were put into practice, the losses, if any, occurring on the Greenwich branch, would be materially reduced. What were these economies recommended? In brief, they consisted of 2-hour car service (already discussed), one-man operation, and the use of a single car with none in reserve. Very little is said as to the physical condition of the lines and the assumption is warranted that there exists no plan for their rehabilitation, nor any suggestion as to where the money will be procured to put them into safe operating condition.

Conclusions.

[3] I am of the opinion that the petition for leave to abandon these lines should be granted. Operation, however, should not be stopped forthwith, but only after such a lapse of time as will enable the changed conditions to be met and opportunity given for different means of transportation to be established, if present patronage is sufficient to attract a substitute or less expensive service.

An order should follow granting the prayer of the petition to be effective as of January 1, 1928.

Commissioners Pooley, Van Namee, and Brewster, concur; Commissioner Lunn dissents in opinion.

Hudson Valley Railway Company.
Operating Income Accounts, Year 1926.
Schedule "A."

	Entire system Company's Exhibit 39	Greenwich branch Company's Exhibit 49 [1]	Greenwich branch Company's Exhibit 49 [2]	Greenwich branch Company's Exhibit 51 [3]	Greenwich branch Village of Greenwich Exhibit 59 [4]
Revenue from transportation:					
101 Passenger revenue	$584,294.86	$20,707.43	$20,707.43	$20,707.43	$20,707.43
102 Baggage revenue	.....	.....	.....	.....	.....
103 Special car revenue	2,284.63	61.33	61.33	61.33	61.33
104 Mail revenue	4,713.35	192.03	192.03	192.03	192.03
105 Express revenue	11,238.45	588.89	588.89	588.89	588.89
106 Milk revenue	.....	.....	.....	.....	.....
107 Freight revenue—carload	13,475.20	1,098.63	1,098.63	1,098.63	1,098.63
Freight revenue — less carload	92,559.90				
108 Switching revenue	144.00	.....	.....	.....	.....
109 Miscellaneous transportation	.....	.....	.....	.....	.....
Total	$708,710.39	$22,648.31	$22,648.31	$22,648.31	$22,648.31

Revenue from other railway operations:					
110 Station and car privileges	$8,335.40	$120.66	$120.66	$120.66	$120.66
111 Parcel room receipts	804.70	.....	.....	.....	.....
112 Storage	40.54	.....	.....	.....	.....
113 Demurrage	136.00	.....	.....	.....	.....
114 Telephone and telegraph service	.....	.....	.....	.....	.....
116 Rent from equipment	.....	.....	.....	.....	.....
117 Rent from buildings and other property	1,268.50	.....	.....	.....	.....
118 Power	53,893.72	13,387.50	2,850.98	13,387.50	13,387.50
119 Miscellaneous	209.93	1.95	1.95	1.95	1.95
Total	$64,688.79	$13,510.11	$2,973.59	$13,510.11	$13,510.11
201 Railway operating revenue	$773,399.18	$36,158.42	$25,621.90	$36,158.42	$36,158.42
Operating expenses:					
Maintenance of way and structures	$124,826.15	$8,089.00	$6,603.30	$6,603.30	$7,716.76
Maintenance of equipment	130,417.01	5,808.85	6,559.98	6,559.98	4,034.47
Power	156,086.79	10,624.88	8,256.99	13,416.98	9,184.27
Conducting transportation	259,099.93	13,984.96	13,032.73	14,302.32	11,288.42
Traffic	*1,125.71*	.....	.....	.....	.....
General and miscellaneous	118,003.78	6,773.42	5,014.82	7,198.23	1,071.94
213 Railway operating expenses	$787,307.95	$45,281.11	$39,467.82	$48,080.81	$33,295.86
Net operating revenue	*$13,908.77*	*$9,122.69*	*$13,845.92*	*$11,922.39*	*$2,862.56*
215 Taxes	50,850.00	2,066.38	2,557.76	2,066.38	2,066.38
Operating income	*$64,758.77*	*$11,189.07*	*$16,403.68*	*$13,988.77*	*$796.18*
Excluding power sales—operating income	.....	*$16,302.78*	.....	*$19,089.79*	.....

[1] Includes power sales and power expenses incident to sales.
[2] Prepared along lines similar to Exhibit 4.
[3] On basis similar to Exhibit 49 but all power receipts included.

Schedule "B."

	As allocated by P. S. C. Greenwich branch (a)
Revenue from transportation:	
101 Passenger revenue	$20,707.43
102 Baggage revenue	.....
103 Special car revenue	61.33
104 Mail revenue	192.03
105 Express revenue	588.89
106 Milk revenue	.....
107 Freight revenue—carload / Freight revenue—less carload	1,098.63
108 Switching revenue	.....
109 Miscellaneous transportation revenue	.....
Total	$22,648.31
Revenue from other railway operations:	
110 Station and car privileges	$120.66
111 Parcel room receipts	.....
112 Storage	.....
113 Demurrage	.....
117 Rent from buildings and other property	.....
118 Power	13,387.50
119 Miscellaneous	1.95
Total	$13,510.11
201 Railway operating revenues	$36,158.42

Operating expenses:		
	Maintenance of way and structures	$6,600.31
	Maintenance of equipment	5,453.05
	Power	10,624.88
	Conducting transportation	12,081.40
	Traffic	.....
	General and miscellaneous	5,307.19
213	Railway operating expenses	$40,066.83
	Net operating revenue	$3,908.41
216	Taxes	2,066.38
	Operating income	$5,971.79
	Excluding power sales—	
	Operating income	$11,245.70

Schedule "C."

		Warrensburg branch Company's Exhibit 47 (A)	Warrensburg branch Company's Exhibit 50 (A) (B)	Warrensburg branch Company's Exhibit 52 (C)
	Revenue from transportation:			
101	Passenger revenue	$7,402.00	$7,402.00	$7,402.00
102	Baggage revenue	.....	.....	.....
103	Special car revenue	.....	.....	.....
104	Mail revenue	382.96	382.96	382.96
105	Express revenue	340.53	340.53	340.53
107	Freight revenue—carload / Freight revenue—less carload	662.63	662.63	662.63
108	Switching revenue	.....	.....	.....
	Total	$8,788.12	$8,788.12	$8,788.12
	Revenue from other railway operations:			
110	Station and car privilliges	$23.10	$23.10	$23.10
111	Parcel room receipts	.....	.....	.....
112	Storage	7.07	7.07	7.07
113	Demurrage	.....	.....	.....
117	Rent from buildings and other property	96.00	96.00	96.00
118	Power	293.75	1,703.04	293.75
119	Miscellaneous	.50	.50	.50
	Total	$420.42	$1,829.71	$420.42
201	Railway operating revenues	$9,208.54	$10,617.83	$9,208.54
	Operating expenses:			
	Maintenance of way and structures	$7,680.00	$3,944.51	$3,944.51
	Maintenance of equipment	2,413.21	3,912.51	3,912.51
	Power	4,563.01	4,932.34	4,095.97
	Conducting transportation	5,939.13	7,773.00	6,140.67
	Traffic	.....	.....	.....
	General and miscellaneous	3,622.72	2,990.94	3,186.10
213	Railway operating expenses	$24,218.07	$23,553.30	$21,279.76
	Net operating revenue	$15,009.53	$12,935.47	$12,071.22
216	Taxes	2,231.21	1,525.50	2,231.21
	Operating income	$17,240.74	$14,460.97	$14,302.43
	Excluding power sales—operating income	$17,363.67	.....	$14,339.66

(A) Includes power sales and power expenses incident to sales.
(B) Prepared along lines similar to Exhibit 4.
(C) On basis similar to Exhibit 50, but all power receipts included.

Schedule "D."

	As allocated by P. S. C. Warrensburg branch (A)
Revenue from transportation:	
101 Passenger revenue	$7,402.00
103 Special car revenue	.....
104 Mail revenue	382.96
105 Express revenue	340.53
107 Freight revenue—carload / Freight revenue—less carload	662.63
108 Switching revenue	.....
Total	$8,788.12
Revenue from other railway operations:	
110 Station and car privileges	$23.10
111 Parcel room receipts	.....
112 Storage	7.07
113 Demurrage	.....
117 Rent from buildings and other property	96.00
118 Power	293.75
119 Miscellaneous	.50
Total	$420.42
201 Railway operating revenues	$9,208.54
Operating expenses:	
Maintenance of way and structures	$3,939.51
Maintenance of equipment	3,254.37
Power	4,563.01
Conducting transportation	6,140.67
Traffic	.....
General and miscellaneous	2,572.32
213 Railway operating expenses	$20,469.88
Net operating revenue	$11,261.34
215 Taxes	2,231.21
Operating income	$13,492.55
Excluding power sales—	
Operating income	$13,618.57

(A) Includes sale of power and expense incident to such sales.

Lunn, Commissioner, dissenting: As was stated in our former opinion:

"To establish its right to the proposed abandonment under the statute it is necessary that the petitioner show:

"(1) That the lines sought to be abandoned are no longer necessary for the successful operation of its road, and

"(2) That they are no longer necessary for the convenience of the public."

The evidence offered by the petitioner upon the rehearing was, in the main, supplemental to and explanatory of the evidence of financial losses previously introduced. Prior exhibits were brought down to date; income accounts, constructive income accounts, and estimates were introduced and the items contained therein were computed upon a more direct and satisfactory basis.

While all of this evidence tended to strengthen petitioner's claim of financial loss, no new evidence was introduced to show that the lines sought to be abandoned were no longer necessary for the convenience of the public. As was stated in our former opinion, which was unanimously adopted, financial loss alone does not justify the abandonment of a portion of a street railway, so I can see no reason for reversing our former determination. I am of the opinion that the savings which might be realized from the abandonment of these lines are slight in comparison with the convenience and necessity to the public having the service continued, especially if the economies recommended are put into practice. There is difference of opinion as to whether these economies would bring about the desired result but certainly they are worthy of a fair test before the lines are definitely abandoned.

It is apparent that petitioner has embarked upon a program of piece-meal abandonment of its less lucrative lines. Until the extent to which this program is to be carried out is definitely ascertained, I am opposed to any further abandonments. I, therefore, am of the opinion that we should not reverse our former decision but deny the petition.

PENNSYLVANIA PUBLIC SERVICE COMMISSION.

D. M. HARLACKER

v.

ADAMS TRANSIT COMPANY.

[Complaint Docket No. 7249.]

Certificates of convenience and necessity — Failure to secure — Excuses — Existing service.

1. Testimony relative to the adequacy or inadequacy of motor carrier service rendered by the holder of a certificate of convenience and necessity is irrelevant in a proceeding in which operation without a certificate is complained against, as any inadequacy of existing service cannot confer upon another operator the right to operate without approval of the Commission, p. 13.

P.U.R.1928A.

Certificates of convenience and necessity — When required — Contract operation.

2. The carriage of the members of a baseball club over its circuit by motor bus under contract is illegal without a certificate of public convenience from the Commission even though under the contract the compensation is to be computed upon the basis of the number of miles the bus may travel instead of the number of persons carried, p. 14.

[August 8, 1927.]

COMPLAINT asking that the Adams Transit Company be restrained from operating in territory of Hanover, Pennsylvania; restraining order issued.

By the **Commission:** Complainant is the holder of a certificate of public convenience authorizing it to operate in group or party service from Hanover, York county. The respondent holds, *inter alia,* a certificate of public convenience to operate in group or party service from the city of York. It appears that complainant had for some years carried the members of the Hanover Base Ball Club from Hanover to towns on what is known as the Blue Ridge Circuit. In April of this year, however, the management of said Club entered into a verbal contract or agreement with the respondent under which respondent agreed to furnish a bus with a driver to transport the members of said club from Hanover during the ball season of 1927 to various points on said circuit, all of which except Chambersburg and Waynesboro, are outside of Pennsylvania. The compensation for this service is based, not upon the number of persons carried on any particular trip, but upon the bus mileage and the size of the bus used in each case. The route to Waynesboro from Hanover passes out of Pennsylvania into Maryland and back again into Pennsylvania. Respondent's operation under said agreement is the subject matter of this complaint.

[1] There was considerable testimony relative to the adequacy or inadequacy of the service which the complainant had rendered to the said club. This testimony is irrelevant as any inadequacy of complainant's service cannot confer upon respondent the right to operate without approval of the Commission. It is manifest that respondent is not vested with any authority to render the aforesaid service by virtue of its certificate of public convenience.

Under that certificate it is limited, as to group or party service, to business originating at York and it cannot enlarge it to include Hanover as a point of origin.

[2] Respondent contends that no certificate of public convenience is necessary for this service, as it is rendered pursuant to its aforesaid contract with the Base Ball Club. This contention is untenable in so far as the service is rendered to points within this state. The operation is from a fixed origin to definite terminals over specified routes in one of respondent's busses driven by one of its drivers. The fact that under the contract the compensation paid is to be computed upon the basis of the number of miles the bus may travel instead of the number of persons carried therein does not change the character of the service rendered. These are the usual incidents of group or party service, for which a certificate of public convenience is required and which respondent itself is rendering from the city of York with the approval of this Commission.

As to the transportation from Hanover to Chambersburg, and from Hanover to Waynesboro, all of which towns are in Pennsylvania, the complaint will be sustained and the respondent directed to cease and desist from such service unless and until it shall have received from this Commission a certificate of public convenience authorizing such service.

MINNESOTA SUPREME COURT.

STATE
v.
ANDREW J. LEFEBVRE.

[No. 26358.]

(— Minn. —, 215 N. W. 188.)

Appeal and review — Conclusiveness of lower court findings on original application — Automobiles.

Although an application to a state supreme court to stay the operation of an order of the Railroad and Warehouse Commission relative

to restricting the carriage of passengers by a motor operator except on mail trips, after a similar application has been denied by the district court, is not in the nature of an appeal, yet the high court, if disposed, may give weight to conclusions reached by that court and concur therein, unless the facts presented make it reasonably certain that unjustifiable prejudice or injury will result from a denial of the application.

[July 8, 1927.]

APPLICATION to supreme court to stay operation of district court order; application denied.

Appearances: Alfred L. Thwing and R. A. McOuat, both of Grand Rapids, for appellant; C. L. Hilton, Attorney General, and Gannon, Strizich & Farnand, of Hibbing, for the state.

Per Curiam. Appellant carried the mail between Hibbing and Grand Rapids under a contract with the post office department, and made one daily trip each way for that purpose. He carried passengers on these trips, and also made additional daily trips to carry passengers. On May 13, 1925, he made an application to the Railroad and Warehouse Commission, under chapter 185, Laws of 1925, for a certificate authorizing him to transport passengers by motor vehicle between those places. On December 8, 1925, the Commission made an order authorizing him to carry passengers on the trips in which he carried mail, but on no other trips. He appealed to the district court, and on January 9, 1926, the district court made an order staying the operation of the order of the Commission during the pendency of the appeal.

The proceedings in the district court were prolonged by continuances for the convenience of the parties, and the decision of that court affirming the order of the Commission was not filed until February 14, 1927. Appellant made a motion to amend the findings of fact and conclusions of law so as to grant his application in full. On June 13, 1927, the court made an order amending the findings of fact in certain particulars, but denying the motion in all other respects. Appellant appealed to this court, and applied to this court for an order staying the operation of the order of the district court pending the determination of the appeal.

The statute (G. S. 1923, § 4651) provides that an appeal to the district court from the order of the Commission shall not stay

the operation of the order unless the court, after notice and hearing, shall so direct. The order of the district court staying the operation of the order of the Commission was continued in force until the final order of the court of June 13, 1927.

The statute (G. S. 1923, § 4659) provides that an appeal to the supreme court shall not stay the operation of the order or judgment of the district court, "unless the district or supreme court shall so direct." In connection with the application to the district court for amended findings and other relief, appellant applied to the district court for an order staying the operation of the order and judgment of the court during the pendency of an appeal to the supreme court. This application was denied. The district court, having heard and considered the evidence, is familiar with the facts and circumstances and in a much better position to determine whether the situation is such that to stay ought to be granted than this court can possibly be at the time the appeal is taken and before the record is filed or the case submitted. For this reason we wish it understood that such applications should be made to the district court in the first instance, as was done in this case, unless there be some special or extraordinary ground for invoking the power of this court at the outset.

While an application to this court after a similiar application has been denied by the district court is not in the nature of an appeal, yet for the reasons stated we are disposed to give weight to the conclusion reached by that court and to concur therein, unless the facts presented make it reasonably certain that unjustifiable prejudice or injury will result from a denial of the application.

A year and a half has elapsed since the making of the original order, and we find no reason which we deem sufficient to require us to grant a further stay after it has been denied by the trial court.

Application denied, and order to show cause discharged.

P.U.R.1928A.

MISSOURI SUPREME COURT.

STATE EX REL. CAMPBELL IRON COMPANY et al.

v.

PUBLIC SERVICE COMMISSION OF MISSOURI.

[No. 27845.]

(— Mo. —, 296 S. W. 998.)

Rates — Test period — Orders subject to court review.

1. While the Commission has power to enter a temporary order to test the accuracy and reasonableness of proposed telephone rates, such orders are subject to review by the court upon application of an opposing city under Rev. St. 1919, § 10522, p. 23.

Rates — Test period — Nullity of extensions pending review.

2. A Commission has no jurisdiction to make extension of a temporary order to test the reasonableness of proposed telephone rates pending a review of the same by a court upon application of a municipality, p. 24.

Rates — Test period — Expiration of order under review.

3. Former rates of a telephone company do not automatically go into effect upon expiration of rates directly in a temporary test order of the Commission which is under review of the court upon application of the city, p. 24.

Rates — Test period — Continuance of order pending judicial review.

4. While the function of a Public Service Commission is to determine and fix just and reasonable rates, and in so doing it may require reports of a utility over a test period and reserve jurisdiction to make further orders, nevertheless on the issuance of a writ of review, its jurisdiction to make further orders ceases and the current rates remain in force until decision by the courts, p. 24.

Rates — Jurisdiction of Commission to terminate rates found reasonable.

5. A Commission has no jurisdiction to limit the existence of rates found to be just and reasonable by its own prior order, and any attempted subsequent limitation by order is void and of no effect, p. 24.

[June 27, 1927.]

En banc. ORIGINAL CERTIORARI by State ex rel. Campbell Iron Company against Public Service Commission; writ quashed.

Appearances: Frank Y. Gladney, of St. Louis (Joseph R. Markham, of Webster Groves, of counsel), for relators; D. D. McDonald and J. P. Painter, both of Jefferson City, for Public Service Commission; J. W. Jamison, E. W. Clausen, and E. J.

Bean, all of St. Louis, for Southwestern Bell Telephone Company.

Gantt, J. Relators state the case as follows:

"This case is an original proceeding in this court. Relators applied for a writ of certiorari addressed to the Public Service Commission. The application of the writ was filed last December. The court issued the writ February 15, 1927. Respondent made its return thereto March 15, 1927. On March 23, 1927, relators filed a motion for judgment on the pleadings.

"The case is to be considered, therefore, on the record made up of the relators' application and the return; as the return does not deny any of the allegations of the application, those allegations are to be taken as true.

"The object of the proceeding is to have the court review and quash the record of two orders made by the Commission affecting telephone rates in the city of St. Louis. These orders were entered, respectively, on July 23, 1926, and October 29, 1926, and, for the sake of convenience in identifying them, are referred to in this discussion and argument as first extension order and second extension order.

"The facts and circumstances under which they were issued may be shortly stated.

"In November, 1924, there was pending before the Public Service Commission a proceeding entitled as follows:

" 'Before the Public Service Commission of the State of Missouri.

" 'In the Matter of the Application of the Kinloch Long Distance Telephone Company of Missouri, Kinloch Telephone Company, the Suburban Telephone Company, Sedalia Home Telephone Company, and Kinloch Building Company, to Sell All Their Property, Assets, and Rights of Every Nature and Description to the Southwestern Bell Telephone Company, and the Application of the Southwestern Bell Telephone Company for Permission to Purchase the Same.

" 'Case No. 3270.'

"On November 15, 1924, the telephone company filed with the Commission in that proceeding a paper entitled 'Supplement-

al Petition of the Southwestern Bell Telephone Company,' by which the telephone company prayed the Commission to abrogate the then existing rates for telephone service at the exchange of the telephone company in the city of St. Louis. In said petition the telephone company set out the existing rates, and alongside therewith the increased or proposed rates which it prayed the Commission to authorize and sanction.

"The city of St. Louis by leave intervened, and filed a written opposition to the increase.

"On the issue thus made the Commission instituted an inquiry, heard evidence of the contending parties, investigated the facts by its own employees and experts, set the whole matter down for a final hearing, and thereafter, on June 6, 1925 (15 Mo. P. S. C. R. 365, 383, P.U.R.1925E, 378), entered the following order:

"This cause being at issue upon application and answer filed herein, and having been duly heard and submitted by the parties, and such investigation of matters and things involved having been had and the Commission on the date hereof having filed its report containing its findings of fact and conclusions thereon, which said report is made a part hereof:

"Now, upon the evidence in this case, and after due deliberation, it is

"*Ordered*: (1) That the Commission finds that the Southwestern Bell Telephone Company's proposed schedule of rates in its St. Louis exchange are just and reasonable, and should be permitted to become effective, beginning July 1, 1925, for a trial period of thirteen months.

"*Ordered*: (2) That any and all increases of telephone rates provided for in said schedule referred to and authorized herein shall, at the end of said thirteen months' period, cease and expire, without further notice or order; and the rates and charges of said Southwestern Bell Telephone Company for furnishing telephone service in said St. Louis exchange shall then be reduced and restored by said company to the rates now on file and charged by it for such service: Provided, however, that the Commission may hereafter by further order continue in effect such increases

in rates and charges for another and further period, or otherwise change or modify such rates and charges.

"*Ordered:* (3) That said Southwestern Bell Telephone Company be required to keep full and accurate account of the revenues and expenses of operating its exchange at St. Louis, and file a full and complete report thereof with this Commission, on or before July 31, 1926, for the year ended June 30, 1926; that said report shall be in addition to any other reports now required by law; and that the Commission fully retains jurisdiction of the parties and subject-matter of this case to continue, change, or modify the rates for telephone service charged by said company in its St. Louis exchange, upon the expiration of said thirteen-month period, or at any other time upon the evidence as said Southwestern Bell Telephone Company or any interested parties may offer.

"*Ordered:* (4) That this order take effect on the 18th day of June, 1925, and that the secretary of the Commission forthwith serve copy of this report and order on the parties interested herein, and that said parties be required to notify the Commission, on or before the effective date of this order, in the manner required by § 25 of the Public Service Commission Law, whether the terms of this order are accepted and will be obeyed.

"Thereupon the city (under authority of R. S. 1919, § 10522) filed in the circuit court application for a writ of certiorari or review. The application was filed on July 3, 1925, was addressed to the Commission, made returnable July 31, 1925, and directed the Commission (to quote the statute) 'to certify its record in the case to the court.' The Commission made its return on July 30, 1925. Thereafter the case was heard by the circuit court on November 13, 1925, and taken under advisement, and on December 7, 1925, the circuit court entered its judgment affirming the order of the Commission. The city in due time filed its motion for a new trial and in arrest of judgment, both of which motions were overruled. Thereafter, in due time, on January 21, 1926, the city filed an affidavit for an appeal to this court. On the same day the court approved the cost bond and allowed the appeal, and the city thereafter, and about March 29, 1926, filed a transcript of the judgment in the office

of the clerk of this court, and had the cause there docketed, and the appeal has since been pending, and is now pending, on the calendar.

"In taking an appeal from the judgment of the circuit court, the city did not file 'a suspending bond,' and hence under the statute (§ 10523) the order of the Commission of June 6, 1925, *supra,* affirmed by the circuit court, continued in force and effect, notwithstanding the appeal to this court. The appeal brings in question the validity, legality, authority, and reasonableness of the order, but, there being no suspending bond, it does not suspend the operation and execution of the order.

"And in this proceeding the relators do not attack or question such order of June 6, 1925. That order has been superseded by the judgment of the circuit court, and the appeal from the judgment of the circuit court has the effect of investing this court with exclusive jurisdiction over all the proceedings culminating in the judgment affirming the Commission's order. For the statute (§ 10525) expressly provides: 'The original transcript of the record and testimony and exhibits, certified by the Commission and filed in the circuit court in any action to review an order or decision of the Commission, together with a transcript of the proceedings in the circuit court, shall constitute the record on appeal to the supreme court.'

"But now the order of June 6, 1925, *supra,* is self-limiting. It explicitly provides that 'any and all increases of telephone rates . . . authorized herein shall, at the end of said thirteen months' period (i. e., thirteen months after July 1, 1925) cease and expire, without further notice or order; and the rates . . . shall then be reduced and restored . . . to the rates now on file and charged . . . for such service: Provided, however, that the Commission may hereafter by further order continue in effect such increases in rates and charges for another and further period or otherwise change or modify such rates and charges.'

"First Extension Order.

"In this posture of affairs on July 23, 1926, the telephone company filed with the Commission a 'Report and Application for Order' continuing in effect the increased rates allowed by

the order of June 6, 1925, *supra,* and which said increased rates were by the express terms of that order due to expire on July 31, 1926. On the same day, viz. July 23, 1926, without notice and without a hearing, the Commission entered an order extending the increased rates 'for a further period of three months, from July 31, 1926, to October 31, 1926.'

"The order was made to take effect 'from and after this date,' viz. July 23, 1926.

"Second Extension Order.

"On October 25, 1926, the telephone company filed a 'Motion and Application,' by which it requested the Commission 'to issue its final order in said cause fixing and adjudging said rates (i. e., those approved June 6, 1925, *supra,* for a period of thirteen months expiring July 31, 1926) to be the lawful rates until changed in accordance with the law.

"On October 28, 1926, the city of St. Louis filed an 'Answer and Motion,' by which it opposed a further extension of the increased rates on various grounds set forth; it asked for an opportunity to be heard, and requested the Commission to set the cause down for further hearing.

"On the day following, viz. October 29, 1926, the Commission, without notice and without a hearing, entered an order extending the increased rates 'for a further period of three months, from October 31, 1926, to January 31, 1927.' This order, like the preceding one, was made to take effect 'from and after this date,' viz. October 29, 1926.

"In this same order the Commission recites the request of the city of St. Louis for a further hearing, and says it 'is of opinion that the request is reasonable, and the same is, therefore, granted.' It is clear that what the city requested was a hearing on the matter of further extending the increased rates. The Commission responded by ignoring the request, and granting a further extension of the increased rates without notice or hearing, and then setting the cause down for further hearing. Accordingly, on the same 29th day of October it issued a formal 'Notice of Further Hearing,' fixing November 17, 1926, as the date. On November 17th, with all the parties ready for such further hear-

ing, the Commission declined to proceed further with this case on account of the same pending on appeal in the supreme court, it being of the opinion that they are without jurisdiction until it is returned here by mandate of the court."

Relators contend that:

"When the city obtained a writ of review, jurisdiction of said 'Case No. 3270' was vested in the circuit court, and all jurisdiction, of the Commission (except to see that its order affirmed by the circuit court was carried out) ceased, and the judgment of the circuit court took the place of the order of the Commission. The appeal from the circuit court to this court vested all jurisdiction over said Case 'No. 3270' in this court. The Commission is without authority to take further steps in that proceeding until it receives the mandate of this court."

[1] The respondent, on the 6th of June, 1925, *supra,* after a full and complete hearing of evidence, according to law, made the order finding the rates proposed by the Southwestern Bell Telephone Company to be just and reasonable. This finding and order in effect found the rates on file to be unreasonable and confiscatory. There can be only one just and reasonable rate for the service given by the telephone company. On this finding and order, the proposed rates of the telephone company were the only rates in force. Respondent, for testing purposes, required the telephone company "to keep a full and accurate account of the revenues and expenses of operating its exchange in the city of St. Louis, and file a full and complete report thereof with the Commission on or before the 31st of July, 1926, for the year ending the 30th of June 1926." In addition, it retained jurisdiction to extend the order of the 6th of June, 1925, at the end of thirteen months for further investigation and reports from the telephone company on its revenues and expenses. "Test orders" have been approved and held by this court to be the best way to determine the reasonableness of rates fixed by the respondent. State ex rel. Washington University v. Public Service Commission, 308 Mo. 328, 347, P.U.R.1926A, 764, 272 S. W. 971; State ex rel. Watts Engineering Co. v. Public Service Commission, 269 Mo. 525, P.U.R.1917C, 581, 191 S. W. 412, Ann. Cas. 1917E, 786; State ex rel. Case v. Public Service Commission, P.U.R.1928A.

298 Mo. 303, 333, P.U.R.1923E, 431, 249 S. W. 955. We adhere to our ruling in these cases. The city had the right to have this order reviewed. Section 10522, R. S. 1919. To hold otherwise would permit the respondent to prevent the review of its orders in the courts by making extension orders over an indefinite period of time. So we are confronted with the right of respondent to make test orders and the right of the city of St. Louis to have the order of the 6th of June, 1925, *supra,* reviewed in the courts.

[2–5] Relators contend the respondent did not have jurisdiction to make extension orders pending the review in the courts. The so-called extension orders were made by respondent after the issuance of the writ of review and after the respondent made its return to said writ. We agree to this contention. However, we do not agree that at the end of the thirteen months the former rates of the telephone company were restored. To so hold would prevent further investigation by tests. Of course, should the judgment of the circuit court be affirmed, the respondent may continue its investigation of the revenues and expenses of the telephone company. The function of the Commission is to determine and fix just and reasonable rates. In doing so reports may be required of the utility over a test period, and the Commission may reserve jurisdiction to make further orders in the case. On the issuance of a writ of review its jurisdiction to make further orders ceases, but this does not mean that the rates fixed by the Commission terminate at the end of the test period. If such rates are found to be just and reasonable, the Commission is without jurisdiction to arbitrarily limit their existence. They remain the rates until changed by an order lawfully made in this proceeding, or in a new proceeding, before the Commission upon changed conditions effecting the same subject. The respondent was without jurisdiction to limit the existence of the rates found to be just and reasonable in the order of the 6th of June, 1925, *supra.* All that part of said order attempting an arbitrary limitation of the existence of said rates is null and void. Therefore, the so-called extension orders (to quote the language of Faris, J., in Darrow v. Briggs, 261 Mo. 244, 169 S. W. 118, 125) are "without form and void" (Genesis: 1:2). They did not extend

the rates named in the order of the 6th of June, 1925, *supra*. Said rates continued in force after the 13-month period under the order of the 6th of June, 1925, *supra*, and until lawfully changed by the respondent. There being no effective extension orders of respondent, the motion of relators for judgment on the pleadings is overruled, and the motion of respondent to quash the writ of certiorari is sustained. Writ quashed.

All concur.

Motion for rehearing overruled July 11, 1927.

OHIO COURT OF APPEALS, ADAMS COUNTY.

ALMA T. STONE et al.

v.

H. B. OSBORN, MAYOR et al.

(— Ohio App. —, 157 N. E. 410.)

Ordinances — Duplicity — Sale of electric utility.

1. There is no duplicity in an ordinance requiring the village to lease its electrical plant, sell its equipment, and grant a franchise, these three elements all being necessary to carry out a single object,— the sale of the village electrical utility—and, therefore, not a violation of a statute (§ 4226 General Code) forbidding ordinances containing more than one subject, p. 27.

Discrimination — Electric — Free service to municipality.

2. An ordinance provision that the purchaser of a village electric utility shall furnish current to a certain amount free of charge to the village for ten years is not unlawfully discriminatory, p. 27.

Municipal plants — Discretion as to sale — Conclusiveness of action of municipality.

3. Courts will not disturb the judgment of a municipal board acting in its sound discretion, in deciding to sell a city electric plant, unless evidence shows discretionary abuse, fraud or collusion, p. 29.

Municipal plants — Sale to former city officer — Disability of purchaser affecting valid sale.

4. A contract for the sale of a municipal electric utility to a former municipal trustee, who had resigned shortly before in order to make his bid therefor, is valid and binding, since his subsequent purchase is not in violation of an act (General Code § 12910) penalizing public officers financially interested in municipal contracts, p. 29.

P.U.R.1928A.

Municipal plants — Sale to former city officer — Disability of purchaser affecting validity of sale.

5. A contract for the sale of a municipal utility to a former municipal trustee, who had resigned two days before the proposed sale to make his bid therefor, is valid and binding, since his action is not in violation of an act (General Code § 12912) punishing municipal officers "interested . . . in the profits of any contract" with the corporation or acting as "commissioner, architect, superintendent or engineer in any work undertaken by the corporation" for one year after their term, p. 29.

Sale — Defects in enabling ordinance cured by contract clause.

6. An ordinance requiring the sale of a municipal utility but omitting to require security for the performance of the purchaser is cured by a clause in the contract of purchase warranting freedom from encumbrance, dismantling, or alienation without the consent of the municipality, p. 32.

[January 6, 1927.]

TAXPAYER'S suit to enjoin sale of village electric utility; petition dismissed.

Appearances: Bagby & Bagby, of Georgetown, and Nichols, Speidel & Nichols, of Batavia, for plaintiffs; Edgar G. Millar, of Portsmouth, and Blair & Littleton, of West Union, for defendants.

Sayre, J.: June 8, 1926, the council of the village of Manchester, Ohio, passed an ordinance directing the board of trustees of public affairs to lease the real estate and sell the personal property belonging to and used in the operation of the municipal electric light plant of the village and to grant a franchise to the purchaser and lessee thereof to enable him to operate the same. The sale was made and the lease entered into on August 28, 1926. June 30, 1926, the plaintiffs, who are taxpayers of Manchester, brought this suit to enjoin the defendants, the mayor, clerk, treasurer and board of trustees of public affairs, from selling or leasing any such property, real or personal. A supplemental petition was filed September 30, 1926, in which it was averred that one J. A. Shriver, who had been a member of the board of trustees of public affairs since the first Monday in January, 1926, had resigned an August 12, 1926, and on August 14, 1926, had made a bid in writing to purchase the lease the property above referred to at an inadequate price, and that his bid had been

accepted. The prayer of the supplemental petition is that the ordinance, bid, sale, and lease be declared void, that defendants be enjoined from further carrying out such sale and lease, and for all other proper relief.

[1] It is claimed that the ordinance is invalid because it contains more than one subject in violation of § 4226, General Code. The title reads as follows:

"An Ordinance Authorizing the Board of Trustees of Public Affairs of the Village of Manchester, Ohio, to Lease the Real Estate and Sell the Equipment and Appliances of the Municipal Electric Light Plant of said Village and Grant a Franchise to the Purchaser and Lessee thereof to Improve, Enlarge, and Operate the Same."

It was held in Elyria Gas & Water Co. v. Elyria, 57 Ohio St. 374, 49 N. E. 335, that distinct measures, like the purchase of waterworks and the erection of new ones, could not be combined in one resolution of council, because it was the object of the statute that the proposition for each separate improvement "shall stand on its own merits, unaided by combination" with any other measure.

The language of Judge Cooley, quoted in Heffner v. Toledo, 75 Ohio St. 413, at page 424, 80 N. E. 8, 9, is that the general purpose of such provisions as are contained in § 4226 "is accomplished when a law has but one general object, which is fairly indicated by its title."

It seems to us clear that the ordinance in hand does not deal with more than one measure or more than one general object, and that general object is to unload the municipal electric light plant of Manchester upon some purchaser who will be compelled to operate it. Now, in order to accomplish such object it became necessary, it seems, in the view of council, to sell the personal property to such purchaser, to lease the real estate to him, and to grant him a franchise to operate the municipal plant. These three things were necessary to carry out the one measure or object. There is here no violation of § 4226.

[2] The ordinance of June 8, 1926, provides that the purchaser shall furnish the village, free of charge for ten years, electric energy according to the rates named in the ordinance to an

extent that if charged for according to such rates would equal $2,400 annually. Another claim is made to the effect that when a municipality does not own and operate an electric light plant it is an unlawful discrimination against the private consumer to furnish electricity for public municipal purposes without a levy therefor. We are unable to see the force of this objection. The argument is stated as follows:

"The individual who does not become a private consumer at once becomes a public consumer, free of charge. Such a one gets the benefit of the public lighting without a single bit of expense and herein consists the unlawful discrimination."

The idea seems to be that if no levy is made for the purpose of paying for the light furnished in public places those who do not use electricity will get the benefit of the public light free. This is certainly not very serious. Does not the inhabitant who pays no taxes get the benefit of public lighting free when the city pays for its light by taxation? And is there not then a discrimination in favor of such person and against the taxpayer? No scheme can be devised which will operate without some discrimination.

It is conceded that the Manchester municipal light plant had become obsolete and inadequate, that it could not be operated without loss, and that within the language of § 3698, General Code, the real and personal property used in the operation of such light plant was "not needed for any municipal purpose."

One of the principal arguments in favor of the injunction is that the personal and real property should be sold separately, and that the municipal plant should not be sold as a going concern, and that since the intention of the council as expressed in the ordinance is to have the purchaser continue the business of furnishing electric light and power to the village and its inhabitants, and since a franchise has already been granted to another company to furnish electric energy in said city, it will result in the property selling for less than a fair and adequate price, and that such scheme of lease and sale as provided in the ordinance of June 8 is a violation of § 3698, General Code. But we can see in such scheme of lease and sale as proposed in the ordinance no violation of § 3698, which provides that a munici-

pality may sell or lease real estate and may sell personal property if not needed for any municipal purpose. The procedure for such sale or lease of property is defined in §§ 3699 and 3703, but we can find nothing in those sections which runs counter to the plan adopted by the council.

[3] Now, with the question whether from a business standpoint the scheme was wise or unwise this court has nothing to do. The rule is that the court will not substitute its judgment for that of the board or officer performing administrative functions upon any question such board or officer is authorized by law to determine, except for an abuse of discretion or for fraud or collusion on the part of such board or officer. Brannon v. Board of Education, 99 Ohio St. 369, 124 N. E. 235; State ex rel. Dayton v. Patterson, 93 Ohio St. 25, 112 N. E. 142; State ex rel. Clemmer & Johnson Co. v. Turner, 93 Ohio St. 379, 113 N. E. 327.

[4, 5] It appears that J. A. Shriver was a member of the board of trustees of public affairs of Manchester from January 1, 1926, until he resigned on August 12, 1926; that he was such member when the ordinance of June 8 was passed; that it was on his motion that the ordinance was approved by the board of trustees of public affairs and a resolution to carry such ordinance into effect was also passed; that he continued as such member until two days before he on August 14 submitted a bid as purchaser for the property which was to be leased and sold; and that the board of trustees of public affairs awarded the same to him and his associates, who had formed a partnership to lease and purchase the property advertised for lease and sale. It is contended that this action on the part of Mr. Shriver and his associates amounts to actual and constructive fraud and is in violation of the statutes of Ohio.

We are unable to find anything in the record which amounts to fraud, and, unless the contract between Mr. Shriver and his associates on the one hand, and the board of trustees of public affairs on the other, is invalid by reason of statutory provisions, the contract must stand.

Sections 12910, 12911, and 12912, General Code, read as follows:

"Sec. 12910. Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employee of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education, or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years.

"Sec. 12911. Whoever, holding an office of trust or profit, by election or appointment, or as agent, servant, or employee of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education, or a public institution with which he is not connected, and the amount of such contract exceeds the sum of fifty dollars, unless such contract is let on bids duly advertised as provided by law, shall be imprisoned in the penitentiary not less than one year nor more than ten years.

"Sec. 12912. Whoever, being an officer of a municipal corporation or member of the council thereof or the trustee of a township, is interested in the profits of a contract, job, work or services for such corporation or township, or acts as commissioner, architect, superintendent or engineer, in work undertaken or prosecuted by such corporation or township during the term for which he was elected or appointed, or for one year thereafter, or becomes the employee of the contractor of such contract, job, work, or services while in office, shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both, and forfeit his office."

These are the only sections of the statutory law that deal with the matter in any way, and certainly Mr. Shriver has not violated either the letter or spirit of §§ 12910 and 12911.

Has he violated § 12912? The answer to this question depends upon the language in the section to which the phrase, "or for one year thereafter," relates.

The original section found in 66 Ohio Laws, at page 164, § 92, reads:

"No member of the council or any officer of the corporation shall be interested, directly or indirectly, in the profits of any contract, job, work, or services (other than official services to be performed for the corporation) nor shall any member or officer act as commissioner, architect, superintendent, or engineer in any work undertaken or prosecuted by the corporation during the term for which he was elected or appointed, or for one year thereafter."

By the revision of 1880 (§ 6976, Revised Statutes), the section was changed to read as follows:

"An officer or member of the council of any municipal corporation or the trustee of any township who is interested directly or indirectly in the profits of any contract, job, work or services for the corporation or township, or acts as commissioner, architect, superintendent or engineer in any work undertaken or prosecuted by the corporation or township during the term for which he was elected or appointed, or for one year thereafter, shall be fined. . . ."

The meaning of the section has not been changed since the revision of 1880 in so far as the question in hand is concerned. We cannot see in the revision of 1880 any intention to change the meaning of the original act, so that under the rule announced in State ex rel. Clough & Co. v. Comrs. of Shelby County, 36 Ohio St. 326, the construction must be the same as before the revision.

The original form of the section is not confusing. The prohibition is, first, against any municipal officer being interested in the profits of any contract . . . other than for his official services, and, second, against any municipal officer acting as commissioner . . . in any work undertaken or prosecuted by the corporation during his term or for the year following. The officer is forbidden to become interested in the profits, job, work, or service for the corporation. The officer is also forbidden to act as commissioner, architect, superintendent, or engineer in work undertaken or prosecuted by the corporation during a stated period of time, that is, during his term and the year following.

We decline to follow the decisions in Findlay v. Parker, 9

O. C. D. 710, and State ex rel. Winn v. Wichgar, 27 Ohio Cir. Ct. R. 743.

Mr. Shriver did not violate § 12912.

[6] In the original ordinance there was no provision requiring security that the contract would be carried out by the purchaser, but this omission is cured by the stipulation in the contract itself wherein it is provided:

"The parties hereby adopt as a part of this contract, that said personal property is to be used by second party or their assigns, for the purpose of operating the electric light plant, and producing electrical energy only, as provided in said ordinance; and that said second party has no right to, and will not sell, encumber, dispose of, or remove said personal property or any part thereof from said village of Manchester, Adams county, Ohio, without the written consent of the council of said village, or other officer of said village legally in charge thereof, and that the first party has and retains a lien on all of said property so sold and to the leasehold estate herein of second party, to secure the compliance of second party with all the obligations of said ordinance and resolution hereunder."

Since the provision for lack of which the ordinance is challenged is in the contract, there is no ground for objection either to the ordinance or contract for the reason stated.

There are other questions in the case, but we do not deem it necessary to go into them.

The decree will be for the defendants, and the petition will be dismissed.

Decree for defendants.

Mauck, P. J., and Middleton, J., concur.

COLORADO PUBLIC UTILITIES COMMISSION.

RE WESTERN SLOPE MOTOR WAY, INCORPORATED et al.

[Application No. 667, Decision No. 1232.]

Service — Curtailment — Passenger train — Alternative motor service — Damage to highway.

1. Authority to curtail passenger train service between points P.U.R.1928A.

served by a motor transportation company subsidiary to the railroad should not be denied on the ground that a county cannot afford to stand the expense of repairs and maintenance resulting from motor bus operation, if the damage to the road is more than counterbalanced by the taxes paid by the railroad and the taxes and license fees paid by the motor bus company, p. 37.

Service — Adequacy — Public convenience and necessity.

2. The phrase "public convenience and necessity" means a reasonable necessity to meet a convenience of the public, and what is reasonably adequate service is a question of fact depending upon all the circumstances surrounding the case, p. 38.

Service — Discontinuance — Return as a whole — Passenger and freight.

3. The fact that a railroad company is earning a substantial profit on its freight service on a branch is not conclusive in determining whether the railroad should be permitted to curtail passenger train service operated at a loss, although such operation at a loss is not in itself conclusive, p. 38.

Service — Passenger train curtailment — Alternative motor carrier service.

4. Authority was granted to curtail passenger train service operated at a loss on a branch line, except from July 1st to October 15th each year, provided that passenger train service should be rendered when the highway was impassable for motor busses or in such a condition that trips could not be made within a reasonable time, p. 39.

Service — Railroad and motor bus — Records.

5. Upon the authorization of curtailment of passenger train service while motor bus service could be adequately rendered, it was ordered that a book be kept in the railroad and motor bus offices showing the number of the bus, date, time of departure, time of arrival, and cause for delay, which should be signed daily by the driver and initialed by the operator or agent for correctness provided such delay exceeded one-half hour, p. 39.

[May 18, 1927.]

APPLICATION for temporary discontinuance of motor bus service and for discontinuance of passenger train service during a portion of the year; granted upon condition. Order modified on May 28, 1927, with respect to time of filing tariffs.

Appearances: Thomas R. Woodrow, for the Denver & Rio Grande Western Railroad Company, and Western Slope Motor Way, Inc.; Milliard Fairlamb, Delta, and Arthur A. Clements, Paonia, for the Chambers of Commerce of the city of Delta, the town of Paonia, and the town of Hotchkiss; Milton R. Welsh, Delta, for the Board of County Commissioners of Delta county.

By the Commission: The question involved herein is whether the Denver & Rio Grande Western Railroad Company, hereinafter referred to as the Railroad Company, which operates a branch line from Delta to Somerset, both in the state of Colorado, known as the North Fork branch, should be permitted to discontinue passenger train service thereon except from July 1st to October 15th of each year. The Railroad Company offers to furnish express service three times a week during the last half of June and the last half of October in connection with its freight train. The citizens of the communities served, by and through the chambers of commerce of Delta, Paonia, and Hotchkiss, and the board of county commissioners of Delta county, have seriously protested against said discontinuance.

The hearing herein was had in the town of Hotchkiss, beginning on April 26, 1927, concluding on the 28th following.

The passenger service rendered by the Railroad Company between said points has been as follows: From November 16, 1914 to April 2, 1921, daily mixed train from Delta to Somerset and return; from April 3, 1921, to March 15, 1924, daily passenger train between Delta and Somerset and return; from March 16, 1924, to June 5, 1926, daily passenger train from Grand Junction through Delta to Somerset and return; from June 6, 1926, to January 29, 1927, daily mixed train between Delta and Somerset and return; from January 30, 1927, to date, daily passenger train between Grand Junction and Somerset and return.

On June 15, 1923, this Commission granted to the Motor Transportation Company, a corporation, a certificate of public convenience and necessity authorizing the operation of motor vehicles for transporting passengers, express, and baggage between Grand Junction, Delta, Montrose, Paonia, and intervening points. On May 19, 1926, Western Slope Motor Way, Inc., a Colorado corporation, hereinafter referred to as the Western Slope Company, agreed to purchase from said the Motor Transportation Company, and the latter agreed to sell to the Western Slope Company, the motor vehicles used and operated by said the Motor Transportation Company pursuant to said certificate

of public convenience and necessity. The said agreement for purchase and sale included also the certificate of public convenience and necessity held by the Motor Transportation Company, and also the good will and common carrier business which theretofore had been conducted between the points mentioned in said certificate.

The transfer and assignment provided for in said agreement was approved and authorized by the order of this Commission dated May 26, 1926, which order constituted a certificate of public convenience and necessity to the Western Slope Company.

Daily passenger, express, and baggage service between Paonia and Delta has been rendered by said the Motor Transportation Company and its said successor, first by the former, later by the latter, from the year 1923 to February 1, 1927, without interruption or cessation for a single day, except that occasionally, on account of road conditions, one round trip instead of two was made daily.

As the result of a conference by and between officers of the Railroad Company, the officers of the Western Slope Company and some of the citizens served by the North Fork branch, permission of this Commission was asked by the Western Slope Company for temporary abandonment of said service rendered by the latter company. An order granting said permission was entered January 28, 1927, upon the agreed condition that the Railroad Company furnish daily service during the temporary period, originally fixed as the months of February and March.

The Western Slope Company on June 1, 1926, filed an application for a certificate of public convenience and necessity for the operation of a motor transportation line for the carriage of passengers, baggage and express between Paonia and Somerset and intervening points. If granted such certificate, the Western Slope Company would then be authorized to operate from one end of the North Fork branch to the other. This application is granted in a separate order of even date herewith.

The Western Slope Company is a subsidiary of the Railroad Company. It has a capitalization of $100,000, the majority of which is owned by the Railroad Company. It has much adequate equipment, and on March 1, 1927, had a cash balance

of $16,000. None of its equipment is encumbered. That it has a strong financial condition is not questioned. Its service has consisted, of one round trip daily from Paonia to Delta, and in the future will consist of said trip and an additional round trip daily from Somerset to Delta.

If the application of the Railroad Company for said discontinuance is granted, the Western Slope Company and the Railroad Company agree to use the railroad stations as bus stations, to sell through interchangeable tickets good on both the motor bus and the Railroad Company lines, to receive baggage and express with the same through privileges as are customarily given express and baggage originating on the railroad alone. Moreover, the Railroad Company offers to run a passenger train from Somerset to Delta and return on all days, if any, when the highway is in such a condition that busses cannot be operated, provided it has notice of such condition by 11:59 o'clock P. M. of the day preceding.

The certificate of public convenience and necessity was granted said the Motor Transportation Company, as aforesaid, against the vigorous protest of the Railroad Company. The organization of the Western Slope Company and the purchase by it of the assets of its predecessor was prompted by a desire of the Railroad Company to protect itself, and its revenues.

The rail passenger, baggage and express service on the North Fork branch is furnished at a heavy loss. During February and March of this year, when the passenger motor busses were not operating and the Railroad Company had a monopoly, the loss was at the rate of more than $10,000 per year.

The citizens of the communities served make two principal contentions.

1. They say the fruit, for which the district is noted, is seriously injured by the jars and dust incident to shipment by motor bus express. The evidence shows there is no substantial amount of fruit moving from the district prior to June 15th. After November 1st the only fruit moved by express is an occasional small shipment of apples. As the railroad company will operate an express car on its passenger train from July 1st to October 15th, and on its freight train on Tuesdays, Thursdays,

and Saturdays from June 15th to July 1st, and from October 15th to November 1st, as it offered at the hearing, practically all the fruit shipped by express will move by train.

2. It is contended the highway over which the busses operate is seriously injured by them, and that the county cannot afford to stand the expense of the resulting repairs and maintenance required. Much evidence to this point was admitted. The superintendent of maintenance, District No. 2, of the state highway department, in whose district the road is located, testified that the average annual per mile maintenance cost during the past four years, in which period the passenger busses have been operating, on the road from Delta to Hotchkiss is $125 to $130, and from Hotchkiss through Paonia to Somerset, $50 to $60. The same witness testified that two passenger busses making the round trip daily increase the annual maintenance cost some thirty dollars per mile from Hotchkiss to Somerset, and very little from Delta to Hotchkiss. We take this testimony as stating the facts, because the witness is both qualified to speak with accuracy and more disinterested than other witnesses.

[1] Whether the question of the effect upon the road of the operation of motor busses thereon is material is not free from doubt. If it be material, it is a circumstance, an item of evidence which is not conclusive. But assuming that it is material, we are confronted, on the one hand with a serious loss in rail passenger, baggage, and express service tending to impair the general service rendered by the Railroad Company in the state, and, on the other, with the fact that the Railroad Company is paying $62,500 a year general taxes to Delta county, $10,400 of which is for road purposes, and the further fact that the Western Slope Company will be paying to the state and county quite substantial revenue in the form of per passenger mile taxes, license fees, and personal property taxes on its equipment. If the damage to the road is material it is more than counterbalanced by the facts stated.

It is further urged that the highway between Paonia and Somerset is highly dangerous because of certain railroad crossings and a narrow road between Bowie and Somerset which runs between an irrigation ditch and the North Fork branch of the

Gunnison river. This, of course, is material. In places this road is only some 13 or 14 feet in width. It is a state highway on which the public in general travel. While it is dangerous if reckless driving is done thereon, we believe experience shows that bus drivers as a rule are much more careful than drivers of privately owned and operated cars, and that fewer accidents occur on what is considered a dangerous road than on roads considered safe, on which the driving is usually more reckless. The evidence shows, in this case that the drivers of the busses operated by the Western Slope Company are very careful and that for the period they have operated between Paonia and Delta no accidents of any consequence, if at all, have occurred. It is possible, although at considerable expense, to place the irrigation ditch further from the road, as has been done once in recent years, and thus make the road wider. The highway apparently is deemed by the state highway department and the county commissioners safe enough at the present time for the general public to be allowed to travel over it, and we see no reasonable probability of any accident on the part of the busses so long as they are operated, as we assume they will be, in a reasonably careful manner.

[2] Of course, if the rail passenger service were, under all the facts, "a necessary service" such as we find described in Colorado & S. R. Co. v. Railroad Commission, 54 Colo. 64, 94, 129 Pac. 506, it would obviously be improper to allow the discontinuance, but the facts in that case, on which the necessity was based, are so dissimilar that they need no comparison. As was held in Re Donovan, P.U.R.1921D, 488 at p. 493, the phrase "public convenience and necessity" means a reasonable necessity to meet a convenience of the public. What is reasonably adequate service is a question of fact depending upon all the circumstances surrounding the case. Wayne v. Pere Marquette R. Co. (Mich.) 1924D, 317 at page 319.

[3] While the fact that the Railroad Company is earning a substantial profit on its freight service on the North Fork branch, as is the fact, is not conclusive, neither is the fact that the passenger service is being rendered at a loss conclusive. It was contended at the hearing that if the passenger service rendered on

a branch line is not profitable, that service, as distinguished from the entire operations on the branch, could be discontinued, irrespective of the profits made on the branch or the road as a whole in that or other lines of service, citing Re Gardiner Train Service, P.U.R.1925B, 367. There the Montana Commission held that, in view of all the facts, "the carrier will be discharging its primal obligation to serve by furnishing the mixed passenger train service four days a week" on that particular branch. That there is no absolute right to discontinue passenger service on a branch line merely because that class of service thereon is not profitable is held by the New York Public Service Commission in Re Long Island R. Co. P.U.R.1919E, 275, in which the Commission said, pp. 278, 279:

"The passenger traffic on this branch taken by itself does appear to be unprofitable but that fact alone does not justify the company in discontinuing it. The total business of the branch is not unprofitable. Most of the passengers on this are commuters who originate at points on the Montauk division, where they reside; and there is no claim that this division or the railroad as a whole is not prosperous, or that the passenger service as a whole is not profitable. The company is under certain obligations to serve the passengers who patronize this branch, and it is not excused from performance merely because the branch taken by itself does not pay. It cannot, to repeat the common expression, pick and choose, but must take the lean with the fat."

With this statement we fully agree.

[4, 5] But after giving serious and careful thought and consideration to all the facts and circumstances, we are of the opinion, and so find, subject to the exceptions and conditions herein stated, that the public convenience and necessity does not and will not in the future, require operation by the Railroad Company except from July 1st to October 15th each year of its passenger train.

We believe and find that the public convenience and necessity requires the Railroad Company to furnish a round trip passenger train service daily, not only when the highway is impassable, but also when the condition thereof is such that the motor

bus or busses cannot make the trip within a reasonable time. If the trip cannot be made within a reasonable time, the public convenience and necessity is not adequately served, although the bus may at some late hour finish the trip. We believe and find that the public convenience and necessity requires train service when, on account of inability of motor busses to arrive in Delta on time, reasonable rail and motor bus connections cannot be made in Delta. We shall not attempt at this time to limit the excess time, required, by reason of the condition of the highway, to make the motor trip, but shall for the present leave the matter to the discretion of the Western Slope Company and the Railroad Company, subject to what we have stated about reasonable time connections. We do believe it advisable and necessary, in order that this Commission and the public may have a check on the delays that may occur in the motor bus operations, due to bad roads or accidents, that a registration book be kept in the railroad and motor bus offices in Delta, Somerset, and Paonia, which should have columns for and show the number of the bus, the date, time of departure, time of arrival, and cause for delay, if the delay exceed one half hour, which should be filled in and signed daily by the driver and initialed by the operator or agent for correctness. This book should be kept open for the inspection of the Commission and any representative thereof and the public in general. We believe, since the rail passenger service is now in operation and the time for its being put on for regular summer and fall service is so near at hand, that the Railroad Company should continue to operate said train until October 15th, at which time it should furnish express car service on Tuesdays, Thursdays, and Saturdays in connection with the operation of its freight train for and during the period expiring on October 31st.

Statement

The decision made and order rendered in this matter is dated May 18, 1927. Since that date it has been brought to the attention of the Commission that while the Western Slope Motor Way, Inc. is not required to begin its operations until October 15, 1927, the Commission in the order required the Motor Way

to file its passenger and baggage tariff with the Commission within twenty days of the date of the order. It now appears that no useful purpose will be served by the filing of the tariff so long in advance of the beginning of operations. The Commission, therefore, finds that the public convenience and necessity does not require a filing of said tariff earlier than September 15, 1927.

COLORADO PUBLIC UTILITIES COMMISSION.

RE PAUL J. BUTTERBAUGH et al., Doing Business as Denver & Leadville Stage.

[Application No. 516, Decision No. 1397.]

Certificate of public convenience — Assignment of application.

An application for a certificate of convenience and necessity should be dismissed when none of the original applicants are present at the hearing and two different parties appear who both claim to have purchased the business and rights of the original applicants, only one of which exhibits a signature of an original applicant.

[July 30, 1927.]

SUPPLEMENTAL APPLICATION for certificate of convenience and necessity filed by alleged purchasers of original application; application refused.

Appearances: J. N. Truitt, Denver, for V. D. Perry and E. A. Horn; John T. Maley, Denver, for M. C. A. Middlemist; Thomas R. Woodrow, Denver, for the Denver & Rio Grande Western Railroad Company; J. Q. Dier, Denver, for the Colorado & Southern Railway Company; John M. Boyle, for Park county; D. A. Hessick, for Chaffee county.

By the **Commission**: On February 1, 1926, Paul J. Butterbaugh and D. E. Tilden, copartners doing business as the Denver & Leadville Stage, filed an application with this Commission for a certificate of public convenience and necessity to operate a motor vehicle carrier system for the transportation of passengers between Denver and Leadville and intermediate points. Protests were filed against this application by the Denver & Rio Grande Western Railroad Company, the Lions Club of Buena

Vista, Colorado, the Board of County Commissioners of Park county, Colorado, the Colorado & Southern Railway Company, a number of citizens from Garo, Buffalo Creek, and Hartsel, Colorado, Foster Cline, the County Commissioners of Chaffee county, residents of Fairplay, Como, Alma, the Dillon Chamber of Commerce, Pine, Frisco, and Jefferson, Colorado.

On March 18, 1927, a supplemental application was filed by V. D. Perry and E. A. Horn, in which it is alleged that on August 1, 1926 they bought all the right, title, and interest to the business known as the Denver-Leadville Stage, and to Application No. 516, and that they are now the owners of all that equipment, and ask that they be allowed to proceed under Application No. 516. Neither Butterbaugh nor Tilden joined in this supplemental application.

On March 14, 1927, Paul Butterbaugh, one of the original applicants, filed a statement with this Commission in which he alleges that the firm of Butterbaugh and Tilden sold out its business to M. C. A. Middlemist of Denver, and asks that the Commission issue a franchise to him. Neither Butterbaugh nor Tilden made a personal appearance at the hearing.

On March 22, 1927, the Denver & Rio Grande Western Railroad Company filed a motion to dismiss on the ground that the original applicants have sold and assigned to other parties all right, title, and interest in and to the business known as the Denver-Leadville Stage, and that said applicants are, therefore, not entitled to a certificate as prayed for in the original application. This motion to dismiss was adopted by the Colorado & Southern Railway Company.

This matter was set down for hearing at the office of the Commission, 305 State Office Building, Denver, Colorado, on May 3, 1927, at which time arguments were heard on said motion to dismiss.

It appears from the record and the argument that two supplemental applications had been filed both alleging that this business had been purchased from Butterbaugh and Tilden, the original applicants. It was stated that Tilden's whereabouts were unknown. The matter of substitution of applicants under such circumstances as indicated herein has never before been passed

upon by this Commission. There is no provision in the rules of procedure for such a practice. The Commission is not prepared to say on this record that under no circumstances will it permit an amendment to the application allowing a substitution for the original applicants. When, however, as in the instant case, two different parties appear who claim to have purchased the business of the original applicants prior to the hearing of the application, before a certificate of public convenience and necessity issues, and when no personal appearance is made by the original applicants at the hearing and only one of the original applicants sign the supplemental applications, the Commission is of the opinion that the application should be dismissed.

ORDER.

It is, therefore, *ordered* that the application of Paul J. Butterbaugh and D. E. Tilden, Application No. 516, be and the same is hereby dismissed.

ILLINOIS COMMERCE COMMISSION.

RE EGYPTIAN TRANSPORTATION SYSTEM, INCORPORATED.

[No. 15853-A.]

Monopoly and competition — Inadequate service as reason for permitting competition.

1. A certificate of public convenience was granted to a motor transportation utility upon evidence that railroad service between different points along the proposed route was inadequate and insufficient both as to frequency and as to mode of transportation to meet the demands of a population recently accumulated along hard surfaced highways and that existing railroad service was of interstate character and beyond the jurisdiction of the Commission to impose local schedules, and that such railroads had not voluntarily offered to revise schedules to meet the demand but claimed to be operating at a loss between these points, p. 46.

Monopoly and competition — Restrictions of competing service — Carriers.

2. If a portion of the proposed route of a motor transportation utility be found to coincide with an existing railroad utility rendering

adequate and satisfactory service between such points, the Commission will restrict the motor utility from carrying on local service to the extent that the routes so coincide, p. 46.

Certificates of convenience and necessity — Evidence of necessity.

3. Loss of revenues by existing railroad carriers over territory included in the proposed route of a motor utility is not proof of the lack of demand for service along such routes, and if the requirements of a population newly formed along the state highways appear to be served by the motor utility in a manner impossible to the railroad carriers, a certificate will be granted notwithstanding railroad operating losses, p. 46.

[June 23, 1927.]

APPLICATION of motor transportation utility to Commission for certificate of public convenience; application allowed and certificate issued.

By the **Commission:** The Egyptian Transportation System, Inc., is an Illinois corporation engaged in operating motor busses for the transportation of passengers as a public utility for hire in the state of Illinois under various certificates of public convenience and necessity heretofore granted by this Commission. It has lines in operation between Harrisburg, Marion, Carbondale, Carterville, Herrin, Johnston City, Mt. Vernon, Shawneetown, Sparta, and East St. Louis, Illinois. The first certificate of convenience and necessity was granted such company on December 6, 1920, and the petitioner commenced operation immediately thereafter. The system as a whole is operated successfully, giving frequent transportation between points on the lines in operation, and the company also operates an interstate service from Illinois to the city of St. Louis, in the state of Missouri.

The above entitled cause was filed on November 27, 1925. Notices were served as provided by law and the rules of this Commission and various hearings had by the Commission thereon as follows: On July 7, 1926, at Springfield, Illinois, at which time a partial hearing was had and leave given petitioner to amend its petition by striking out the clause asking for a certificate to transport property, and the cause continued for further hearing to December 21, 1926, at Springfield, at which time evidence was had and leave granted petitioner to further amend

its application and upon motion this cause was divided into two sections with separate numbers, to be known as 15853 and 15853-A. No. 15853 was by agreement continued without date and the hearing proceeded on No. 15853-A. At numerous subsequent hearings both oral and documentary evidence was introduced, the hearing being concluded and the case marked heard and taken on January 18, 1927.

It appears from the record that on January 4, 1927, a further hearing of this case was consolidated with No. 16200, being an application by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, one of the respondents herein, to discontinue two of its passenger trains between Danville, Illinois, and Mt. Carmel, Illinois, said railroad being parallel to State Highway known as No. 1, and at the conclusion of this case said No. 16200 was continued for further hearing.

It appears from the evidence in the case that the petitioner is a duly incorporated company, incorporated under the laws of the state of Illinois and authorized by such charter to engage in the business of operating motor vehicles for the transportation of persons and property over and upon public highways of the state of Illinois, and that its post office address is 1201 Public Square, Marion, Illinois.

It further appears from the evidence that the petitioner is now engaged in the operation of motor vehicles for the transportation of persons and property between numerous and various points over and upon the public highways of the state of Illinois under and by virtue of authority of certificates of convenience and necessity heretofore issued by this Commission.

After this case was finally closed, the Commission in arriving at their conclusion has considered the issues presented by the petition and answers of objectors, and all exhibits offered by the parties pertaining to the route in question.

The record shows without controversy that Mr. Barber, president of the Egyptian Transportation System, Inc., is a practical railroad man of many years' experience in railroad passenger transportation, with experience with both electric and steam railroads, and that for the past six or seven years he has been

actively engaged in the practical operation of motor busses as common carriers of persons.

Mr. Barber has made a detailed and extensive study of the business of public transportation by motor busses and the relative cost thereof, as compared with steam and electric railway transportation. He testified concerning the modern demands on transportation facilities as relates to the particular territory in question, particularly as to the volume, frequency, and accommodation to the public needs, the physical and economic difference between bus and railway passenger transportation and particularly the inability of railroad companies, because of costs of operation and inelasticity of passenger transporation by rail, to meet the business and economic requirements of the cities, towns, villages, and rural communities along the proposed routes. Mr. Barber testified in particular concerning the population of the cities, towns and villages and the growing density of population along the State Aid roads, the frequency and volume of transportation demanded by these new conditions, the cost thereof by rail, and the relative capacity of railroads and electric railroads to serve this necessity of the public as compared with motor bus transportation. Mr. Barber in his testimony presented elaborate exhibits tending to show the co-ordination of the service proposed not only with the bus service which the petitioner already performs but with the railroad service now operated in the territory and the extent to which the railroads would be benefited or injured by reason of increased local transportation facilities, as well as the benefit to the public from the combined transportation furnished by railroads and the bus company.

The evidence further shows that in the operation of the bus routes now operated by petitioner the volume of transportation is large, the frequency of unit movement not less than proposed in the present instance, the patronage regular and persistent, and that accommodation and service is rendered not only to cities and villages located along the routes operated, but an additional service to and from local points not at railroad stations and to and from residences located along the routes operated of a character that railroads do not and cannot perform.

[1–3] Numerous witnesses from various cities and communi-

ties along the proposed routes testified, duly corroborating the evidence of the president of the Egyptian Transportation System, Inc. These witnesses developed the fact that the proposed lines of bus transportation would serve a public necessity and convenience by meeting the public demand of the people for greater frequency of transportation service to and from the cities, villages, and homes located upon the proposed routes in their social and business transactions, the movement of children to and from school and the travel of workmen from their homes to their work and returning therefrom. These witnesses corroborated the fact that since the construction of the hard roads a large number of residences have been located thereon. An actual survey of the residences which have been built since the hard roads were constructed shows an amazing increase, this increase appearing immediately and practically coincident with the completion of the concrete roads. The evidence shows that a large number of homes are located on the route and that the families living in these homes, except those who own their own automobiles, are left without transportation under present conditions inasmuch as the railroads, by reason of their manner of operation, cannot directly serve their daily necessities for transportation in a convenient manner. In fact at this time the only serious objection that the Cleveland, Cincinnati, Chicago & St. Louis Railway Company have to the issuing of a certificate in this case is the possibility of diminishing the income of their passenger trains paralleling Route No. 1, and while the evidence in this case discloses that there is a real and substantial demand for additional transportation over said route, we find in this hearing in the case of No. 16200, an application by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company asking this Commission for leave to discontinue its only daylight trains, save one, between Danville and Mt. Carmel on the ground that they are operating at a loss. We further find from their evidence in support of their application that they are not seriously objecting to the operation of motor vehicle transportation between Danville and Mt. Carmel or anywhere else along Route No. 1, affected by this application.

There is ample evidence and uncontradicted in this record that the transportation service now rendered by the objecting rail-

road companies is entirely inadequate to meet the reasonable demands of the traveling public. The evidence further discloses that the average distance of the hard road paralleling Route No. 1 from the Cleveland, Cincinnati, Chicago & St. Louis Railway Company's tracks is about two miles and discloses and supports the conclusions that the competitive competition by a motor bus company and the railroad companies is very little, if any.

The evidence in the case shows and warrants the conclusion that privately owned automobiles are responsible for 90 per cent of the loss of operating revenue by railroad companies in this state in consequence of being paralleled by the hard roads. There is no offer in this record by the railroad companies, objectors, that they are ready, able, and willing to put in effect service of such frequency and character as the evidence shows the public necessity and convenience demands, nor to establish the practical possibility of rendering the service which modern economic business and social conditions require.

The evidence further shows that the service sought to be rendered by the bus company is not now rendered and cannot be rendered by the railroad companies, both in the matter of frequency of service between the several communities and as to the large number of residences which have recently been built upon the Bond Issue routes. Again, the operation of the bus company would make possible more convenient connections with the fast trains of both the objecting railroads and other railroads not at the present time accessible to the several communities on the routes specified. In these respects, as well as in the matter of the necessary frequency of the service rendered, the operation of the bus company along the routes petitioned for cannot be considered as a parallel or competing service with that of the railroad companies. The same conclusions apply with equal force to the Southern Railway Company, objector, to bus service over Routes 1 and 15 between Mt. Carmel, Illinois, and Mt. Vernon, Illinois. The only other objectors in this case are the intervening petitioners, Illinois Power & Light Corporation, Illinois Traction System, Inc., and the Southern Illinois Railway & Power Company, which objectors the amendments to the application

and the record in this case with reference thereto are rendered nugatory and of very little force.

It is not proposed by the petitioner to do a local business between Danville and Ridge Farm on the north end of highway No. 1, or between Carrier Mills and the city of Eldorado on the south division of Route No. 1. The evidence further shows that the service rendered by the Illinois Power & Light Corporation between Danville and Ridge Farm and intermediate points is ample to meet all the demands and requirements of the travelling public, and, therefore, the Egyptian Transportation System is not asking to do any local business between Danville and Ridge Farm, but only to carry such passengers as offer from Danville to points on Route No. 1 south of Ridge Farm and from points south of Ridge Farm into Danville. Neither does the petitioner ask a certificate for authority to carry local passengers between Carrier Mills and the city of Eldorado, but only for the transportation of passengers originating from points south of Carrier Mills to points north of Eldorado, and from points north of Eldorado to points south of Carrier Mills. It is conceded by the petitioner that the Southern Illinois Railway & Power Company is at the present time rendering adequate and sufficient transportation service to meet all the public demands from Carrier Mills to Eldorado and intermediate points, or from Eldorado to Carrier Mills.

The evidence discloses that between Vienna and the city of Metropolis, there is no opposition or objection from any source whatever as the line does not closely parallel any railway company and conclusively shows that there is a serious public demand for additional transportation and especially such as can be rendered by the proposed service offered by the Egyptian Transportation Company. In the Illinois Power & Light Case, 320 Ill. 427, P.U.R.1926C, 690, 151 N. E. 236, and the Community Bus Case, 320 Ill. 175, P.U.R.1926C, 685, 150 N. E. 668, the court was considering similar operation and in each case merely an extension of service and not a different service was necessary to meet the public demand.

The Commission in considering the instant case upon the

whole record must consider the changed position of objecting railroads and while giving full respect and authority to the opinion of the court on the record then before them, attempt to work out some solution that will meet the economic requirements of the public and at the same time will preserve the equitable and tested rights of the railroads.

In the disposition of the issues involved in this case the Commission must consider whether the character of public transportation sought to be performed by the Egyptian Transportation System, Inc. is similar in its nature to that offered by respondent railroads and whether, even were it similar, respondent railroads are in a position to render such service or could be compelled to render the service under § 51 of the Commerce Act. In other words, if the Commission finds certain service necessary to the public convenience and necessity in the several communities, it may appear, first, that the railroad companies have abandoned this character of service or, second, that the Commission can not effectively order the railroads to render that service under § 51 of the Commerce Act or, third, if the service necessary to the convenience and necessity of the public can not be rendered by the railroads by operation of trains of cars on their railroad tracks, then can the Commission, as an alternative, order the railroads to render this transportation service by the operation of busses upon a public highway approximately paralleling their rights of way and, particularly, as in the present instance, when only a portion of the route traversed by the bus company would be parallel to the railroad companies or within the zone of the railroad companies' activities.

In the matter of Kipp's Express & Van Co. Nos. 12454, 13036–13040, consolidated, P.U.R.1923E, 249, 256, wherein the Kipp Company sought to parallel the Atchison, Topeka & Santa Fe, the Chicago, Rock Island & Pacific, and the Chicago & Alton Railroads in its operations between Chicago and Joliet, Illinois, decided by this Commission June 26, 1923, the Commission used the following language:

"It has been the policy of this Commission not to issue a certificate of convenience and necessity to a new form of transportation in any field where there was a present transportation utility

operating unless the present transportation facility either refused, failed, or was unable to render reasonably adequate transportation service in the field occupied. It is undoubtedly the duty of any transportation company when appearing as an intervener objecting to a new form of transportation from this Commission to show either that it is fully occupying the field and furnishing adequate transportation service or that it will immediately adequately serve the public in the field it occupies. It is equally the duty of a petitioning transportation company as a part of its case to show its ability to furnish all of the transportation facilities necessary, and particularly where it seeks to replace a present transportation facility to show that if such facility is replaced by the new service the public necessity will be better served than at present."

In the last few years there has been a constant tendency on the part of railroads to abandon local service because of cost of operation, decreased patronage or the necessities of interstate operation. In each instance brought to the attention of this Commission the case has turned on the losses in operation by the railroad rather than the necessity of that portion of the local public still dependent on the railroad for transportation. Almost innumerable complaints have come before this Commission where railroads, including objectors in this case, have ceased to stop trains at local stations or have abandoned stations or the service of particular local trains. An examination of the records of this Commission shows an appalling number of small stations abandoned and local service denied because of the proved inability of the railroad companies to render this sort of service. Where trains have ceased to stop at stations involving a mere change in time schedule no record appears with this Commission, but a partial record of the abandonment of service by closing stations or discontinuing local trains appearing in the files of this Commission as formal cases may be cited to show the extent to which the railroads have gone in the state of Illinois either in abandoning or seeking to abandon local transportation service. The records show to date, so far as have been compiled, 99 cases for the abandonment of stations, two of which were by the objector, Southern Railway Company, and four by the ob-

jector, Cleveland, Cincinnati, Chicago & St. Louis Railway Company. There have been 79 cases for the discontinuance of train service, seven of which are by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and a careful and painstaking search of the files of this Commission fails to disclose a single instance where a railroad has increased its local service in Illinois within the last five years.

The Illinois Commerce Act, as well as the rules of conduct of all organized government, is designed to protect the interests or organized society. Changing economic conditions in the manner of conduct of modern business, the tendency of persons living in crowded cities to change their places of residence to points contiguous to the hard road system of Illinois, and the automobile and its economic use in modern transportation are all matters which must be considered in cases similar to that presented by the record herein. If public transportation service is to advance and keep pace with changing conditions, the Commission in the consideration of this case, as well as the careful analysis of all of the records of the Commission in relation to transportation facilities in Illinois, is convinced that some effective method must be devised to protect the transportation furnished by railroad companies within its proper sphere, and at the same time retain an effective remedy which will supply the needs of the people of the state of Illinois.

It further appears from the evidence in this record that the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and the Southern Railway Company and the Illinois Traction System, Inc., all operate and perform an interstate passenger traffic. All or nearly all of their local trains operate interstate or are operated either in connection with or on time schedules which affect the operation of interstate trains.

It further appears from the evidence that the division of highways of the department of Public works and buildings of the state of Illinois has filed with this Commission in the files of this case its permit in writing granting to the petitioner authority to operate its motor busses as a public utility over and along the state bond issue route described in the petition in the transportation of passengers.

The law is too well settled to require citation that local State Commissions may not put any burden upon interstate traffic either in requiring the operation of trains which do not pay or in requiring interstate trains to stop at stations for the rendition of local service, or to order the operation of trains which interfere in their local stops with the operation of interstate trains by the railroad, and in fact it has been said in each of the cases where either of the objecting railroad companies has sought to close a station or discontinue a local train the order of this Commission, if adopted, in the case, has proceeded upon evidence that the operation of the station or of local service rendered by the train in question was a losing venture by the railroad and that the railroad should be relieved thereof.

It can not be considered that this Commission could have any effective remedy in an order for additional service against an interstate railroad under § 51, which had been built without any authority of this Commission because of lack of jurisdiction under § 55.

It also appears from the record that the Egyptian Transportation System, Inc., has ample financial ability to safely and adequately operate its proposed line with the lines already in operation. In view of all of the facts, both of the cost of operation and the limited jurisdiction of this Commission over the train operation of either of objecting railroads, any order under § 51 requiring more frequent service would be ineffective to satisfy the public convenience and necessity in the instant case.

The Commission having considered the entire record, the suggestions of counsel, and being fully advised, finds:

1. That the Commission has full and complete jurisdiction of all parties interested in this proceeding and the subject matter thereof.

2. That the Egyptian Transportation System, Inc., is a corporation organized under the laws of the state of Illinois, and is a utility within the meaning of § 10 of the Illinois Commerce Act; that the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, the Southern Railway, the Illinois Power & Light Corporation, and the Southern Illinois Railway & Power Company are each of them railroads operating in the state of Illinois;

3. That the existing transportation facilities between the cities of Danville and Mt. Carmel and all intermediate points, and the cities of Mt. Carmel and Metropolis and all intermediate points on State Bond Issue Route No. 1, and between the city of Mt. Carmel and Mt. Vernon, Illinois, and all intermediate points on State Bond Routes Nos. 1 and 15 are inadequate and insufficient to meet and supply the reasonable public needs for passenger service, both as to unit movement of transportation passenger carrying facilities, and the convenience and accommodation of the public as to the mode of transportation and kind of service required; and that both the present and future public convenience and necessity require additional transportation facilities in said territory of the kind and frequency offered by petitioner's proposed bus lines.

4. That the existing public utilities now in the field engaged in the transportation of passengers, have neglected to install or offer to install and maintain sufficient transportation service to meet the public convenience and necessity, either as to frequency of transportation service or their service to certain portions of the public upon and over the routes described in the petition in this cause, or to supply the character of service which will meet the convenience and accommodation of the public.

5. That the existing public utility companies rendering passenger transportation service in the field, namely the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, the Southern Railway Company, the Illinois Traction System, Inc., as well as the Illinois Power & Light Corporation except as to traffic between Danville and Ridge Farm, Illinois, and intermediate points and the Southern Illinois Railway & Power Company as to traffic between Carrier Mills and Eldorado, Illinois, and intermediate points, can not lawfully be required by the order of this Commission to install and maintain a greater frequency of service by railroad train service or service of a character substantially similar to that offered by the petitioner between the points involved.

6. That neither of the objectors has voluntarily offered upon this record to supply any additional service to the territory involved in this case, or offered any proof that it can physically or

economically perform the additional service which the evidence shows is required by the public convenience and necessity.

7. That the public convenience and necessity require and demand the operation of motor busses in the carriage of passengers for hire, upon and along the proposed routes between the following named points:

(a) From Danville to Mt. Carmel and intermediate points, and from Mt. Carmel to Metropolis and all intermediate points, over State Bond Issue Route No. 1 except between Danville and Ridge Farm and between Eldorado and Carrier Mills;

(b) From Mt. Carmel, Illinois, to Mt. Vernon, Illinois, and all intermediate points over State Bond Issue Routes 1 and 15.

8. That the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and the Southern Railway Company each operate a railroad in interstate and intrastate traffic.

9. That motor bus transportation on the State Bond Issue Roads mentioned in this cause, which in part parallel the objecting railroad companies' rights of way, can not be considered a paralleling or competing service with the transportation furnished by the railroad companies, in that considerable communities have grown up along the State Bond issue Roads entirely independent of any transportation service rendered by the railroads and whose transportation necessities are not, and can not be, served by the railroad companies.

10. That any order of this Commission requiring either the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, the Southern Railway Company, the Illinois Power & Light Corporation, the Illinois Traction System, Inc., or the Southern Illinois Railway & Power Company to render more frequent train service would be ineffective to relieve the necessities of the public because

(a) certain portions of the public can not be served by the operation of train service by the objecting railroad companies; and

(b) two of said railroad companies are interstate railroads and the rendition of local service, contrary to the policy of the railroad as shown by the records of this Commission, would constitute a burden upon interstate commerce.

P.U.R.1928A.

11. That neither the Cleveland, Cincinnati, Chicago & St. Louis Railway Company nor the Southern Railway Company, nor either of the other railroad companies, has any power, under their charters, to operate motor busses for the carriage of passengers over or along highways paralleling or partly paralleling their rights of way.

12. That the operation of motor busses for the transportation of passengers over and along the routes petitioned for in this cause, can not be considered a transportation service incidental to the operation of either the Cleveland, Cincinnati, Chicago & St. Louis Railway Company or the Southern Railway Company in the maintenance and operation of their railroads under their charter power.

13. That the Egyptian Transportation System, Inc. is amply able, fully, and safely equipped with facilities, has financial ability and possesses the experience to safely and efficiently operate a motor bus system over, along and upon the proposed routes and furnish to the public safe, suitable, convenient, and adequate passenger transportation service by motor bus.

14. That the applicant, the Egyptian Transportation System, Inc., has heretofore secured the consent, in writing, of the department of public works and buildings of the state of Illinois, to operate motor busses upon and along the State Bond Issue Roads of the state of Illinois, upon the following routes:

(a) From Danville to Mt. Carmel and intermediate points, and from Mt. Carmel to Metropolis and all intermediate points, over State Bond Issue Route No. 1:

(b) From Mt. Carmel, Illinois, to Mt. Vernon, Illinois, and all intermediate points over State Bond Issue Routes 1 and 15.

15. That the Egyptian Transportation System has complied with the provisions of § 55a of the Commerce Act, in that they have furnished evidence of record of their ability to pay all damages which may result from any and all accidents due to the negligent use or operation of motor busses along and upon the routes herein petitioned for.

ILLINOIS COMMERCE COMMISSION.

RE EAST ST. LOUIS & INTERURBAN WATER COMPANY.

[No. 14908.]

Valuation — Property for proposed expansion — Water utility.

1. Land bought in advance for proposed and necessary expansion construction was allowed to be included in valuation of property used and useful of a water utility where sound business reasons for such a move were shown, p. 62.

Valuation — Tangible property — Emergency reservoir — Water utility.

2. Where there are local water storage facilities for only a few hours' city supply, an old pumping station, if still efficient, should be kept in service as used and useful property rather than provide additional storage at enormous expense, unless assurance can be had that no interruption to new service will be encountered, p. 62.

Valuation — Stand-by equipment — Probability of emergency — Water utility.

3. Danger of interruption to filtration due to absolute dependency for operation upon distant and exposed electrical connections and a large transmission main, with the consequent shortage of city supply due to lack of storing equipment, is sufficient reason to maintain a yet efficient pumping station as used and useful property of a water utility for substitute service after the inauguration of a new station, p. 64.

Valuation — Stand-by equipment — Franchise obligations — Water utility.

4. Obligations of a water utility's franchise requiring the maintenance of stand-by equipment in readiness for substitute service is sufficient cause for its allowance in valuation as used and useful property, p. 65.

Valuation — Working capital — Gauge of amount — Water utility.

5. Working capital of a water utility is in some measure gauged by the operating expenses, revenues, and collection periods, p. 66.

Valuation — Going value — Water utility.

6. The Commission, in computing valuation for rate-making purposes of a water utility, gave full consideration to the fact that it was a going concern with a value as such, in addition to the actual physical value, p. 66.

Return — Operating expenses — Payments to parent company — Water utility.

7. An allowance of 3 per cent of gross revenues of a water utility to a parent company in lieu of salaries of general officers in recompense of engineering, accounting, and other services rendered the local organization, was approved upon a showing that the value received by the subsidiary was at least equal to the payment, p. 67.

Return — Operating expenses — Calculation of Commission engineer — Water utility.

8. Figures of the Commission engineer as to yearly operating expenses not objected to or shown to be erroneous by either the utility or opposing parties will be deemed substantially correct, p. 67.

Depreciation — Function of reserve — Original cost — Water utility.

9. The depreciation fund is intended to return to the utility at the expiration of useful life of any unit the original and not the reproduction cost thereof, p. 68.

Depreciation — Percentage allowance — Water utility.

10. An annual depreciation fund of 1.5 per cent of the original cost of depreciable property used and useful, assuming earned interest on the same, was allowed in the valuation of a water utility plus 1 per cent of the cost of subsequent additions, p. 68.

Rates — Water utility — Suburban differential — Additional pumping.

11. Where water supplied to a suburban city must be pumped twice to attain sufficient pressure, a water utility is justified in asking a rate differential, p. 70.

Rates — Water — Reduction from increase of service — Fire hydrants.

12. A city at the end of a water main formerly installed for transmission purposes of fire hydrant service with increased rates to defray expenses thereunto incident, is entitled to a reduction of rates when subsequent development of intermediate territory allows profitable distribution of other service along the main, p. 70.

Discrimination — Concessions to large users — Water utility.

13. A total exemption from proposed increased rates of customers using large amounts of water each month upon proof that such customers could as cheaply supply themselves and might withdraw if charged the increase, thereby appreciably diminishing the total revenue of the utility, was refused and a portion of the increase was levied on such customers in what was believed to be a more equitable adjustment of the burden of necessitated increased rates, which would also sustain the patronage of such wholesale users, p. 70.

Return — Water utility — Percentage allowance.

14. An increase of rates calculated to earn a return between 6 per cent and 7 per cent of utility value was allowed, p. 72.

Rates — Water utility — Submission of large users to increase for benefit of employees.

Discussion of submission of large users to increased rates at an immediate loss to convenience employees who are also utility consumers, p. 71.

[September 15, 1927.]

APPLICATION of a water utility for approval of schedule of increased rates on file; approved.

By the Commission: On December 30, 1925 the East St.

Louis & Interurban Water Company filed with the Commission Rate Schedules Ill. C. C. 4, 7, and 8 in which it was proposed to advance the rates for water service in Swansea, Belleville, Brooklyn, Fairmount City, National City, East St. Louis, Granite City, Madison, and Venice, counties of St. Clair and Madison, and further proposed that the rates become effective on February 1, 1926. It appeared from an examination of the said schedules that the Commission should enter upon a hearing concerning the reasonableness of the proposed rates and that pending a hearing and decision thereon the said rates should be suspended.

By appropriate orders heretofore entered, the Commission suspended the said rates until November 29, 1926, On October 21, 1926 the applicant filed with the Commission Rate Schedules Ill. C. C. 5, 8, and 9 in substitution for Rate Schedules Ill. C. C. 4, 7, and 8 and requested that Rate Schedule Ill. C. C. 4, 7, and 8 be withdrawn. Accordingly the Commission, under the date of November 24, 1926, ordered Rate Schedules 4, 7, and 8 permanently cancelled and stricken from the files of the Commission. Under date of November 9, 1926 Rate Schedules Ill. C. C. 5, 8, and 9 were suspended until March 19, 1927 and subsequently were further suspended until September 19, 1927. The matter first came on for hearing April 21, 1925, before the Commission and subsequent hearings were held whereat all interested parties were represented by counsel. Evidence was received from the company in support of the proposed increased rates, from certain objectors including the cities and other interested parties in support of their objections and from the Commission's engineering and accounting staff. After the first hearing in this matter the East St. Louis chamber of commerce retained a consulting engineer to represent all of the objectors in this case. Later the chamber of commerce withdrew from the case and the same engineer was retained by the cities.

Property

The East St. Louis & Interurban Water Company supplies general water service in East St. Louis, Swansea, Belleville, Brooklyn, Fairmount City, National City, Granite City, Madison, and Venice. Water is obtained from the Mississippi river, the

present low service pumping station being located near the river in the northwest part of the city of East St. Louis. The water is treated by coagulation, filtration, and sterilization, the several cities and towns being supplied by a distribution system in which direct pressure is maintained by high service pumps. On account of the difference in elevation it is necessary to maintain a booster pumping station at Edgemont to supply Belleville and Swansea. A new intake and electrically operated low service pumping station location on the Mississippi river approximately ten miles above East St. Louis is practically completed. The water from this station will be delivered through a large transmission main to the present settling basins in East St. Louis and will be upon completion, the principal source of supply and the present low service pumping station at East St. Louis will become a duplicate or a stand-by unit. In addition to the above pumping stations the company maintains stand-by high service pumping stations at Belleville and Granite City.

The property was completely listed by engineers for the water company and the result of their work was submitted in the form of an inventory as evidence in this case by the petitioner. The record shows that this inventory was carefully checked and corrected by the engineering staff of the Commission assisted by engineers employed by the cities and other interested parties and the record further shows that there is no controversy as to its substantial correctness. Before the unit prices were applied to this inventory, and with the consent of the Commission, a conference was held for the purpose of agreeing upon the unit prices to be used, at which conference engineers representing the company, the objectors and the Commission were present. Unit prices as of January 1, 1926, without overheads, were agreed upon for all items except land and the reproduction cost of the land was later agreed upon by the engineers representing the company and the objectors. To the inventory as checked the company applied the agreed unit prices to which they added certain percentages for omissions and contingencies and other overheads, thereby arriving at a reproduction cost appraisal or an estimate of the cost to reproduce the property existing December 31, 1924. To this was added the actual cost of additions

and betterments, including the cost of the new low service intake and pumping station, installed between that date and December 31, 1926, and submits the total thus found as an estimate of the cost to reproduce the property new. To this cost is applied a method of depreciation whereby the so-called present worth or depreciated cost is found.

Evidence as to property value was presented on behalf of the objectors through their engineer who used the agreed unit prices and by a process of eliminations and deductions arrived at his opinion of the value of the property for rate-making purposes. The Commission's engineer ascertained the original cost of the property by using the actual prices paid by the utility so far as could be ascertained from its records supplemented by estimate where the records were not available. He also presented an estimate of the cost of reproduction new made by using the unit prices agreed upon and his own determination of overhead costs. To this cost was applied a per-cent condition which in the opinion of the Commission's engineer reflected the actual physical condition of the property and thereby arrived at his determination of the depreciated cost. The appraisals submitted by the company, the objectors and the Commission's engineer are hereinafter set forth in summarized form. [Tables omitted.]

The record shows that the unit prices used in all the reproduction estimates were agreed to by the engineers representing all the parties of record and there were no objections to the original cost appraisal as submitted by the Commission's engineering staff. The most controverted questions as to value are relative to the usefulness of the East St. Louis low service station, the stand-by high service pumping station at Granite City, and land purchased in Granite City for the location of a proposed new high service pumping station. The company does not list any nonoperating property but completely (100 per cent) depreciates $189,703 worth of property. In his report, the engineer for objectors sets aside, but does not itemize, nonoperating property exclusive of the high service pumping equipment at Granite City and the East St. Louis low service station and equipment, to the amount of $274,877. Upon cross-examination

this witness itemized what in his opinion was nonoperating property and the reproduction cost of the property thus itemized is $202,051. The record further shows that the property itemized by the engineer for the objectors is substantially the same as that determined by the Commission's engineer to be nonoperating, and the Commission's engineer estimates the reproduction cost of this property to be $207,051 and the original cost thereof to be $137,007. The engineer for the objectors also excludes as nonoperating property the present East St. Louis low service pumping station upon the theory that it will not be necessary when the new low service station is in operation, and land purchased in Granite City for a proposed high service pumping station.

[1] The land in question is a tract situated in Granite City and was purchased as the site for a proposed high service pumping station. The record shows that it is necessary to purchase this land for the proposed high service station before attempting to locate the transmission main. This main will connect the new low service station with the proposed high service station in East St. Louis and will supply raw water to both high service stations. The engineer for the objectors admitted on cross-examination that the company exercised good business judgment in purchasing this land before the transmission main was laid. It is the opinion of the Commission that the land in question should be included as used and useful property.

[2] The record shows that the present low service pumping station is adequate to supply the necessary raw water, but as this station was constructed many years ago, increasing pollution of the river by sewage has made it desirable to select a source of supply that is less contaminated than that now in use. After much exploration the company ascertained that a satisfactory source of supply was available some ten miles up the river from the present low service plant. It, therefore, proceeded with the construction of a new low service station and connected this station with the present settling basins and filtration plant in East St. Louis by a transmission main which is approximately ten miles long.

The cities, as objectors, maintain that when the new low serv-

ice plant is placed in operation that the present low service plant and equipment will become nonuseful property and should not be given consideration in fixing rates for service. The company maintains that the present low service plant must be kept in condition to operate and is to be in fact a stand-by station to insure continuous water supply to the cities now being served.

There are several factors to be considered in determining whether or not the present low service station will actually be a necessary stand-by unit and the value thereof as a proper part of the rate base. These factors are: the ability of the low service plant to supply a reasonably satisfactory raw water; the possibility of serious interruptions in the operation of the new low service station and the amount of water available in storage at the high service station to carry on service during an interruption to the raw water supply.

The record shows that a safe and potable water is now being delivered to the community supplied by this company through the use of the present low service station. The record also shows that pollution can become greater and still a satisfactory water supply rendered, although it is desirable to obtain a raw water that is less polluted than is now obtained from the present low service station. The state board of health recommends that this be done.

There being no question as to the adequacy of this station for use as a stand-by, the next factor to be considered is the storage capacity needed in the event no duplication of the low service units is permitted. The present low service station is situated near the present high service station and is operated by steam generated in the high service station boilers. The probabilities of interruption to service from the low service station under present arrangement is remote. The new low service station, however, is located some ten miles from the existing high service station to which it is connected by a transmission main. Under such a condition the National Board of Fire Underwriters recommend that where there is no duplication of a transmission main or adequate provision for additional raw water supply that a storage capacity equal to five-days' consumption plus ten-hours maximum fire flow be maintained. This would require a storage

of approximately one hundred and thirty-five million gallons. The present storage at the East St. Louis plant is approximately seven million gallons which is sufficient only to give a few hours supply to the city of East St. Louis at the peak load. To provide the storage capacity recommended by the board of fire underwriters would require an expenditure far in excess of the cost of the present low service station in East St. Louis. It would, therefore, appear proper to maintain the low service station in East St. Louis rather than provide additional storage and to consider it as used and useful property unless assurance can be had that no interruptions to the new low service station will be encountered.

[3] The record shows that the new low service pumping station is to be electrically operated and that the energy for its operation must of necessity be obtained from a transmission line several miles in length. Interruptions to electric transmission lines by high winds, ice storms, and other causes, are experienced in this state. The large transmission main connecting the new low service station with the present high service station passes under the water of Chouteau Slough for several hundred feet and also passes under approximately fifty railroad tracks. This is a large main constructed of reinforced concrete and the record shows that there is the possibility of a break from one cause or another and that several days might elapse before any break could be repaired and the main placed back in service.

Any interruption beyond a few hours, either to the new low service station or to the transmission main, would jeopardize the safety and health of the several cities supplied with water service by this company. Undoubtedly there would be a very material increase in the insurance rates in the territory served by this company if sole dependence were placed upon the new low service station for supply. To provide storage to carry over any reasonable period required to repair the transmission main would be exceedingly costly. Taking into consideration the public health, the fire hazard, and the cost of new construction to provide adequate storage, it appears to the Commission that the reasonable and proper method of insuring against these emergencies is through the continued maintenance of the exist-

ing low service station so that it can be operated on short notice should anything cause an interruption in the operation of the new low service station or the transmission main connecting it with the high service plant. The Commission, therefore, considers that the present low service station in East St. Louis is used and useful property.

[4] The company's franchise with the city of Madison requires that the high service pumping equipment and storage basins at the Granite City plant be maintained for stand-by service and the record shows that this plant has been operated several times during the past year. In depreciating the reproduction cost new of this property the engineer for the company and the engineer for the city depreciated the high service equipment and storage basins of the Granite City pumping station by substituting for the cost of these units the estimated cost of a duplicate transmission main from East St. Louis to Granite City. The engineer for the Commission has included this plant as used and useful property and depreciated it as such in view of the operating condition. The record shows that this property must be kept in readiness to be operated until such time as a new high service pumping Commission that this property should have been depreciated as operating property and not by the estimated cost of a different plant.

Overheads

Overhead, as the Commission understands the term from this record, is intended to include costs incidental to the construction of the property and, among other items, includes the expense preliminary to construction, legal expenses, omissions and contingencies, interest, insurance and taxes during construction, together with engineering and supervision of the property as it is being constructed. As is estimated by the company's engineer, these costs above numerated amount to $1,663,919 which is approximately 20 per cent of the cost to reproduce the physical property. The engineer for the objectors, testified that 15 per cent of the cost to reproduce this property, exclusive of land, was an adequate and proper allowance for the item of overhead. This Commission's engineer testified that the ag-

gregate overhead allowance reasonably necessary would be $1,357,885.

Working Capital

[5] Working capital is the amount, either in cash on hand or in materials and supplies, or both, that is required by the company to properly meet its current bills and to take advantage of market conditions in purchasing supplies and, accordingly, is in some measure gauged by the operating expenses, revenues, and collection periods. The record shows that the company estimates $120,446 as necessary, and the Commission's engineer estimated substantially the same amount while the engineer for the objectors does not include working capital in his estimates.

Going Value

[6] The item of going value has received much consideration before this Commission and the courts. It appears that going value may be defined as that element of value over and above the phyiscal value which accrues to a plant by reason of the fact that it is in successful operation and is capable of earning revenue under reasonable rates. The petitioner introduced in the record computations to support its claim for going value. In making the computations it is assumed that a four-year period will elapse before the present number of consumers would be connected to the system. The amount of going value its taken as the difference between a fair return during this period and the estimated return during this four-year period. To this estimated difference in earnings is added the estimated cost of securing and attaching the present consumers. The going value so estimated by the petitioner is $1,050,000 and amounts to approximately 10 per cent of the reproduction cost of the property. The engineer for the objectors testified that in his opinion the going value attaching to this property was not in excess of 5 per cent of the reproduction cost new of the physical property. In its finding of value of the entire property hereinafter set forth, the Commission will give full consideration to the fact which appears conclusively in the record, that the East St. Louis &

Interurban Water Company is a going concern, and has value as such, in addition to the actual physical property.

Operating Expenses

The Commission's accounting staff made a complete audit of the company's accounts and introduced in evidence a report setting forth, among other things, the operating expenses, revenues, and related items for the five years last past as reflected on the company's books. The company filed an estimate or forecast of operating costs which takes into consideration the changed conditions to be encountered by the operation of the new low service plant. In addition to this evidence, the Commission's engineer has made a forecast of the annual cost of operation in which he gives consideration to conditions that will exist when the new low service plant is placed in operation. The engineer for the objectors made an estimate of operating expenses which agrees with that made by the Commission's engineer with the exception of the 3 per cent of the gross revenue paid to the parent company and the amount to be set aside to provide for annual accruing depreciation.

[7] The East St. Louis & Interurban Water Company is controlled by the American Water Works & Electric Company which company is paid 3 per cent of the gross revenues received from the sale of water. These charges are in lieu of salaries of general officers and are to recompense the parent organization for engineering, accounting, and other services rendered to the local utility. A detailed study of the effect on the operating expenses by the inclusion of this 3 per cent item shows that the operating cost is not increased over that to be experienced if the services were rendered by local officers and it appears that the services rendered by the parent company to the subsidiary are in value at least equal to the payment.

[8] The operating expenses as ascertained by the Commission's engineer, and about which there is little or no direct criticism of record, are as follows:

Estimate of Normal Operating Expenses.

Source of water supply	$350
Steam power pumping expenses	107,000
Electric power pumping expenses	26,000
Purification expenses	39,600
Transmission and distribution expenses	55,650
Commercial expenses	38,510
New business expenses	2,200
Retirement expense	100,000
General and miscellaneous expenses	88,680
Rental of rights of way	8,930
	$466,920
Uncollectible bills	3,000
	$469,920
Taxes under present rates	127,200
Total operating expenses	$597,120

Should the proposed rates be authorized the Federal income tax would be increased by approximately $18,800 and the total operating expenses would be $615,920.

Inasmuch as neither the objectors nor the company showed that the above figures contained any errors or were in other respects not proper, the Commission will find the cost of operation for a normal year to be substantially as above set forth.

Annual Depreciation

[9] Practically all of the physical property owned and operated by this utility, with the exception of land, is subject to wear and tear, the action of the elements, obsolesence, and other forms of depreciation. The operation of these factors eventually make it necessary to replace the various parts of the property, provision for which must be made by the company out of earnings. The Commission's Uniform Classification of Accounts requires that the annual accruing depreciation be determined in view of the original cost of the property. In other words, the depreciation fund or reserve is intended to return to the utility at the expiration of the useful life of any particular unit the original cost thereof and not the reproduction cost.

[10] As to evidence on the annual accruing depreciation, the record contains computations made by the company's engineer which are based upon the theory that the total annual accruing depreciation that has occurred in the past should be the measure of the amount to be set aside for the future annual accruing de-

preciation. The computations made upon this theory show that the annual rate of depreciation has been 1.057 per cent of the reproduction cost new of the depreciable property. This percentage when applied to the company's reproduction cost new as of June 30, 1926, shows the sum of $102,618 for annual accruing depreciation. The record does not contain any computations for annual accruing depreciation on behalf of the objectors but the engineer testified that in his opinion 1 per cent would be the proper allowance but did not state whether this percentage should be applied to the original cost or the reproduction cost. The Commission's engineer estimates $100,000 per annum for annual accruing depreciation, which is 1.5 per cent of the original cost of the depreciable property used and useful as of June 30, 1926, and takes into consideration the fact that the fund so set aside will earn interest.

The Commission believes, and will find, an annual allowance for depreciation of $100,000 for the used and useful property installed as of December 31, 1926, plus 1 per cent of the cost of additions and betterments installed subsequent to the above date is sufficient and proper.

Operating Revenues

The revenues of the East St. Louis & Interurban Water Company are shown in the report submitted by the Commission's accountant. The Commission's engineer submitted the following estimate of the revenues that are expected to be obtained during the ensuing year under the present rates:

Estimated Revenues under Present Rates.

Metered sales to general consumers	$997,000
Flat rate sales to general consumers	12,000
Municipal hydrant rental	63,500
Miscellaneous sales	21,000
	$1,093,500
Nonoperating revenues	5,000
Total revenue	$1,098,500

The item contained in the above revenue statement noted as municipal hydrant rental is the sum annually paid by the municipalities for public fire protection service. The schedule of rates under which this charge is made is $40 per annum per

hydrant for all the territory served except the city of Belleville where the rate charges is $75 per annum per hydrant for the first 300 hydrants and $60 per annum for each hydrant in addition thereto.

[11, 12] The city of Belleville, through its attorney, has filed in this case a cross-complaint in which the Commission is requested to reduce the rates for public fire protection in the city of Belleville. The record shows that the present rates for public fire protection in the city of Belleville were fixed by agreement between the city and the Belleville Water Supply Company, a predecessor of the East St. Louis & Interurban Water Company. At the time the rates were made the water supply in Belleville was obtained from wells and was inadequate. In order to obtain an adequate supply it was necessary to lay a transmission main from the Edgemont pumping station to Belleville, a distance of approximately ten miles. At the time the transmission main was laid the revenues of the Belleville Water Supply Company were not sufficient to pay a fair return on the additional investment and the above rates for public fire protection were allowed by the city of Belleville. Since the construction of this transmission main, the country contiguous thereto has been developed to the extent that, what was originally a transmission main, is now a distribution main and a considerable revenue is derived therefrom, other than hydrant rental.

All the water supplied to the city of Belleville must be pumped twice and it is necessary to maintain a pumping station in Belleville to furnish additional capacity and pressure for fire protection. Therefore, the rates for all water service in Belleville should be higher than in East St. Louis and vicinity. Since the above rates for public fire protection were made the revenues from the sale of water to other consumers has increased to such an extent that it appears to the Commission that the rates for public fire protection in Belleville should be reduced and the Commission will so find.

[13] The rate schedule proposed by the company and under consideration herein proposes to increase the rates paid by all consumers except those whose consumption is in excess of ten million gallons per month, and for public fire protection. Sev-

eral of the consumers whose consumption is in excess of ten million gallons per month were represented by counsel at the hearings in this case and evidence was introduced by them. The record shows that these consumers obtain the greater part of their water supply from wells and that the only water purchased from the water company is that used for purposes which require filtered and sterilized water. The evidence further shows that these consumers can install the necessary equipment to sterilize their present water supply and thus produce all the water used by them at a cost of approximately the same as they are paying for water under the present rates, and that should their rates be increased, they will cease to become consumers of this utility. The revenue from this class of consumers is an appreciable part of the total revenue received by the company. The record further shows that the rates paid by this class of consumers is more than the out-of-pocket cost or reproduction cost of the service and should these consumers be lost the remaining consumers would be required to pay increased rates if the property is to earn a fair return.

Rates for Service

The evidence indicates that the application for a 25 per cent increase in rates for water service for all consumers except the large industries is based on the showing made by the large industries that any increase in rates for service to them would result in their developing an independent supply for their individual plants. If this should actually happen, it would of course require the company to increase rates to the remaining consumers.

The Commission however is of the opinion that some of the burden of increased rates should be borne by these large industries as well as the smaller consumers. Accordingly, the Commission will hereinafter prescribe a rate schedule which is intended to more equitably distribute the burden of the necessary increased revenues between the subscribers than the schedule proposed by the company and under consideration herein. It does not appear to the Commission that these large industries, whose employees live in the area served by this company and whose

prosperity is to some extent dependent upon the general prosperity of this area, would refuse to bear some of the increased costs which are occasioned by the installation of property by this utility which seeks to be a benefit to the community as a whole. This is virtually what the expenditures made by this water utility will mean by producing a more adequate and satisfactory water service.

[14] The Commission, having considered the record in this case, the representations and arguments made, and being fully advised in the premises, finds as follows:

(1) That the original cost of the property now used and useful by the East St. Louis & Interurban Water Company in rendering water service is $7,600,000 as of December 31, 1927, exclusive of materials, supplies, working capital, going value, or any other elements of intangible value;

(2) That the depreciated reproduction cost of this same property used and useful as of December 31, 1926, is $10,480,000;

(3) That the fair allowance for materials, supplies, and cash working capital necessary for the successful conduct of the water utility business by the East St. Louis & Interurban Water Company in its present condition is $120,000;

(4) That the fair rate-making value of the used and useful property of the East St. Louis & Interurban Water Company in rendering water service, both general and for fire protection purposes, is $10,000,000 as of December 31, 1926, including going value, materials, supplies, working capital, going value, and all other elements of value entering into a rate-making base;

(5) That the fair allowance for annual accruing depreciation for the used and useful property in operation December 31, 1926, is $100,000;

(6) That the fair allowance for operating expenses, including the above finding for annual accruing depreciation including taxes and uncollectible bills, is for the present conditions of operation, that is with the new low service pumping station in service, $616,000 per annum;

(7) That the following schedule of meter rates with a 15 per cent increase on all other rates now on file exclusive of public fire protection service and an annual rate for public fire hydrants

in Belleville and Swansea at $60 per annum, will produce a revenue sufficient to permit this utility to earn a return between 6 and 7 per cent upon the fair value of the property hereinabove found. The schedule of meter rates hereinafter authorized by the Commission is as follows:

Meter rate for East St. Louis, National City, Lovejoy (Brooklyn), Fairmount, Venice, Granite City, Madison and vicinities:

First	13,000	cu.	ft.	per	mo.	.....	27.75¢	per	100	cu. ft.
Next	13,000	"	"	"		.....	23.25¢	"	"	"
Next	27,000	"	"	"		.....	19.00¢	"	"	"
Next	27,000	"	"	"		.....	14.75¢	"	"	"
Next	27,000	"	"	"		.....	10.75¢	"	"	"
Next	27,000	"	"	"		.....	10.25¢	"	"	"
All over	134,000	cu.	ft.	per	mo.	.....	5.4 ¢	"	"	"

The minimum charge for any service supplied by the meter shall be increased 15 per cent over the minimum rate stated in I. P. U. C. 5 1st Revised Sheet 4, and this minimum charge shall not exceed the flat rate for a similar service and like period.

Meter rate for Belleville and Swansea:

First	2,000	cu.	ft.	per	mo.	.....	.34½¢	per	100	cu. ft.
Next	2,000	"	"	"		.....	.30 ¢	"	"	"
Next	4,000	"	"	"		.....	.26 ¢	"	"	"
Next	5,333	"	"	"		.....	.21½¢	"	"	"
Next	6,666	"	"	"		.....	.17½¢	"	"	"
Next	13,000	"	"	"		.....	.15 ¢	"	"	"
Next	33,333	"	"	"		.....	.13 ¢	"	"	"
Next	66,333	"	"	"		.....	.10½¢	"	"	"

The minimum charge for any service supplied by a meter shall be increased 15 per cent over the minimum rate stated in I. P. U. C. 2 Sheet No. 5.

The schedule of rates authorized by this order is to consist of (1) the meter rates above set forth with a minimum bill 15 per cent in excess of that now in effect, and (2) flat rate and other charges (not herein specified) that are 15 per cent in excess of those now in effect. Public fire hydrant rental to be unchanged except in the Belleville district where the said rate is to be $60 per annum per hydrant.

(8) That the rates hereinafter fixed as above indicated are the just and reasonable rates for water service of the East St. Louis & Interurban Water Company and should be made effec-

tive for all water service rendered on and after October 1, 1927; and

(9) That Rate Schedule Ill. C. C. 8 applying to East St. Louis, Fairmount City, Brooklyn (Lovejoy) and National City, and Rate Schedule Ill. C. C. 9 applying to Granite City, Madison, and Venice should be cancelled and annulled.

It is therefore *ordered* by the Illinois Commerce Commission as follows:

1 —That the East St. Louis & Interurban Water Company shall within fifteen days of the date hereof file rate schedules which shall contain just and reasonable rates as hereinabove found, which rates shall be the legal rates for water service rendered by this company from and after October 1, 1927. These rates include the meter rates set forth hereinafter and a 15 per cent increase on all other rates to the company's consumers. No change is to be made in the public fire protection rates for fire hydrant rental in the cities of East St. Louis, Granite City, National City, Madison, Venice, Lovejoy (Brooklyn), Fairmount, and vicinities, while the rates for fire protection in Belleville and Swansea shall be $60 per annum.

Meter rate for East St. Louis, National City, Lovejoy (Brooklyn), Fairmount, Venice, Granite City, Madison, and vicinities:

First	13,000	cu.	ft.	per	mo.	.....	27.75¢	per	100	cu. ft.
Next	13,000	"	"	"		.....	23.25¢	"	"	"
Next	27,000	"	"	"		.....	19.00¢	"	"	"
Next	27,000	"	"	"		.....	14.75¢	"	"	"
Next	27,000	"	"	"		.....	10.75¢	"	"	"
Next	27,000	"	"	"		.....	10.25¢	"	"	"
All over	134,000	cu.	ft.	per	mo.	.....	5.4 ¢	"	"	"

The minimum charge for any service supplied by the meter shall be increased 15 per cent over the minimum rate stated in I. P. U. C. 5 1st Revised Sheet 4, and this minimum charge shall not exceed the flat rate for a similar service and like period.

Meter rate for Belleville and Swansea:

First	2,000	cu.	ft.	per	mo.	.....	.34½¢	per	100	cu. ft.
Next	2,000	"	"	"		.....	.30 ¢	"	"	"
Next	4,000	"	"	"		.....	.26 ¢	"	"	"
Next	5,333	"	"	"		.....	.21½¢	"	"	"
Next	6,666	"	"	"		.....	.17½¢	"	"	"
Next	13,000	"	"	"		.....	.15 ¢	"	"	"
Next	33,333	"	"	"		.....	.13 ¢	"	"	"
Next	66,333	"	"	"		.....	.10¾¢	"	"	"

The minimum charge for any service supplied by a meter

shall be increased 15 per cent over the minimum rate stated in I. P. U. C. 2 Sheet No. 5.

2 —That the East St. Louis & Interurban Water Company shall set aside annually $100,000 to cover depreciation of the property installed prior to December 31, 1926, plus 1 per cent of the cost of all depreciable property installed subsequent to that date.

3 —That Rate Schedule Ill. C. C. 8 applying to East St. Louis, Fairmount City, Brooklyn (Lovejoy) and National City, and Rate Schedule Ill. C. C. 9 applying to Granite City, Madison, and Venice should be cancelled and annulled.

Note.—Valuation.

I. Ascertainment of value and cost generally:
a. Ascertainment of value for rate making:
1. In general, 76.
2. Measures of value, 78.
b. Ascertainment of original or historical cost of investment, 79.
c. Ascertainment of value for consolidation and sale, 80.
II. Nonphysical elements affecting value:
a. Overhead expenses, 80.
b. Paving over mains, 81.
III. Tangible property:
a. Property not paid for, 81.
b. Property not used or useful, 82.
c. Property paid for by consumers, 83.
d. Working capital:
1. Materials and supplies, 83.
2. Specific allowance, 83.
IV. Intangible property:
a. Franchises, 84.
b. Going value, 84.

I. Ascertainment of value and cost generally.

In Re Mountain Water Service Co. Aug 1, 1927, a dispute arose as to the valuation of land owned by the company upon which reservoirs were to be constructed by the company resulting in lakes. The company's expert included in his values for this land a value for the lakes as actually developed which included the costs of the dam for the upper reservoir. The city's expert valued the land in its natural state suitable for formation of lakes or for general watershed purposes. The New Jersey Commissioners were of the opinion that while the company's figure was based on realty values

rather than watershed purposes, yet the figure of the city gave no allowance for the improvement occasioned by the lakes. Accordingly the Commission allowed a figure nearly half way between the two amounts as a just valuation.

a. Ascertainment of value for rate making.

1. In general.

In King v. Trueman, May 16, 1927, Grimmer J., of the New Brunswick supreme court said: "The Board in its judgment followed the rule that actual cost less depreciation form the proper rate base. It is now definitely settled following the judgment in the Canada Southern Railway case and in Re Mersey Docks (1920) 3 K. B. 223; Toronto City v. Toronto Railway (1925) A. C. 191; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400, and numerous other decisions in the United States Courts that after ascertaining the value of services the cost of reproducing the property used in furnishing the service at present cost of labor and materials less depreciation and not merely the original cost of value of the property at some other date must be considered and is the most satisfactory method of proof of such value, and, therefore, should be the proper rule to follow in fixing the rate base."

In Temmer v. Denver Tramway Co. 18 F. (2d) 226, March, 18, 1927, the circuit court of appeals, eighth circuit, affirmed a decree fixing the terms for reorganization of the Denver Tramway Company, over objections that the company was not insolvent because the rate base approved by the Federal Court was in excess of all the liabilities of the corporation. Faris, District Judge, delivering the opinion said: "It is, however, fairly clear, both upon reason and authority, that actual value, or fair and reasonable market value, is not the value that must be taken into account in the case of this sort of valuation. This is so largely because it has been found well-nigh impossible as a practical matter to sell the properties of a great railroad system for cash, or to sell such properties at all, except through the co-operation of stockholders and bondholders, who are induced to buy in order to obviate a sacrifice of their interests. . . . An examination of the constituent elements which go to make up value for the purpose of determining a rate of fares to be charged in order to obviate confiscation discloses, aside from the practical difficulties of the situation, that the rating base value furnishes no proper or legal criterion on which to bottom actual value. The former, roughly speaking—according to the Supreme Court, which concludes us—is, as to physical elements, bottomed on present value of lands held, plus present stable cost of constructing the plant, less depreciation for

use since construction, plus a fair allowance for going value, for intangible elements, and for working capital (McCardle v. Indianapolis Water Co. 272 U. S. 400, 71 L. ed. 154, P.U.R.1927A, 15, 47 Sup. Ct. Rep. 144, decided November 22, 1926, by United States Supreme Court; the latter, in a case like this, generally and practically speaking, on what a willing buyer, under no duress to buy, ought voluntarily to pay when the seller is forced to sell —the very definitions thus disclosing the difference between such former value and actual, or fair and reasonable, market value. The specific elements which enter into the actual value of a great railroad property as a going concern are: (1) 'The value of the use of such property in the operation of its railroads and its net revenue from such use, and, (2) the current market value of its stock and bonds.' Chicago & N. W. R. Co. v. Eveland (C. C. A.) 13 F. (2d) 442. Obviously, the reference to the value of the stocks and bonds must be applied in case of insolvency and reorganization largely to the stocks and bonds of the new organization and not to those of the old and insolvent one, because the latter would not reflect anything earning value, but only exchange value under the plan of reorganization. But nevertheless these differences of constituent elements illustrate the fairly clear distinction existing, between value for rate-making purposes, and fair, market, or actual value, and we think show that the former does not necessarily bear any conclusive, legal relation to the latter. . . . The sum of appellants' numerous contentions is, in the last analysis and when expressed in the vernacular, that appellees may not, as the devil is said to have said in the legendary incident, 'blow hot and cold.' Conceding, arguendo, that equity in some situations frowns faintly at least, on the inconsistency to be inferred from a too tempestuous exsufflation of calidity when immediately followed by a similar exsufflation of frigidity, yet the inequities which follow if any, even when the faults are laid at the right door, are to be measured by fairly well-settled rules and not 'by the length of the chancellor's foot.' Measured by such settled rules, we are constrained to conclude that the decree below was correct."

In Kansas City Southern R. Co. v. United States, No. 704, 19 F. (2d) 591, Dec. 31, 1926, the Federal District Court, Western District, Missouri, on December 31, 1926, held that it had jurisdiction to review an order of the Interstate Commerce Commission fixing the final value of a railroad. The Court said: "If the conclusions of the Commission as to the value of the properties involved were irregularly and erroneously reached, then their invalidity ought to be established, so that petitioners may not be called upon to combat, with evidence, an illegal prima facie case. . . .

Defendants contend that there is lack of jurisdiction, because no legal damage or injury can result to petitioners, since the utmost effect of such a final valuation is as prima facie evidence. We think this is answered by the Kansas City Southern Railway Company's Case (252 U. S. 178, 64 L. ed. 517, P.U.R.1902D, 396, 40 Sup. Ct. Rep. 187) as a matter of authority. On this particular point, the situation in that case is even stronger than here presented because the valuation there was only 'tentative.' Also, we think the contention is wrong in principle. This valuation is not conclusive on the Commission and the courts, but it certainly is intended to and it undoubtedly will affect important rights of these petitioners in a serious if not even in a vital manner. The purpose of the Valuation Act was not to preserve evidence which might be lost. It was to assemble facts and therefrom form and state conclusions of fact, which should be readily usable as evidence. The character of the questions involved, the practical situation surrounding the controversies wherein such evidence would be useful, and the resulting necessity of creating and having readily accessible and legally usable such kind of evidence, all convince of its consequence and importance."

2. Measures of value.

In Re Eastern Connecticut Power Co. Docket No. 4939, July 20, 1927, the Connecticut Commission in authorizing the purchase of stock of electric utilities by another electric company said: "It is not to be assumed, however, from any order of approval by the Commission in this case, that the purchase price of said stock represents the fair measure of the value of the property of any of said companies for rate making, capitalization, or any other purpose than those immediately involved in the question before the Commission."

In Dixfield Light & Water Co. v. Itself, F. C. 632, Sept. 16, 1926, the Maine Commission, in fixing water rates, said: "The actual cost of the 1925 construction, which has been made so recently and for which the details and supporting vouchers have been fully given, plus the amount paid for interest during construction, after making an allowance for depreciation since the date of the construction, may be taken as the present fair value of that portion of the company's property." In ibid the Maine Commission determined the rate base of a water utility by ascertaining the present reproduction cost less depreciation with an addition for working capital.

In Re Yale Teleph. Co. Cause No. 6996, Order No. 3706, Jan. 17, 1927, the Oklahoma Commission was of the opinion that a value found upon the present reproduction theory was the fair

present value for the establishment of rates to be charged by a telephone company.

A reproduction cost of trench excavation for water pipes should not be based upon the cost of loose soil excavation when the soil is rocky. Hall v. Clarks Summit Water Co. (Pa.) Complaint Docket Nos. 6273–6276, 6296, Oct. 25, 1926.

The rate-making value of a water system was ascertained from an appraisal on the split-inventory basis and, in addition, giving weight to the increased price level prevailing at the present time, the actual cost of the equipment not being available. Re Cudahy Bros. Co. (Wis.) U–3393, Dec. 21, 1926.

An important element in determining value for rate making is the actual cost of the property when the investment has been prudently made. Ibid.

b. Ascertainment of original or historical cost of investment.

In Kansas City Southern R. Co. v. United States, No. 704, 19 F. (2d) 591, Dec. 31, 1926, the Federal District Court, Western District, Missouri, annulled and enjoined the enforcement of Commission orders when the valuation of the properties of a railroad was made final on the ground that the Commission had acted beyond its statutory powers and contrary to the evidence, all of which resulted in a denial to the railroad of constitutional rights. The Commission had been directed by Congress to "ascertain and report in detail as to each piece of property, other than land, owned or used by said common carrier for its purposes as a common carrier; the original cost to date; the cost of reproduction new; the cost of reproduction, less depreciation, and an analysis of the methods by which these several costs are obtained and the reason for their differences, if any." Admittedly, the Commission did not do this, but substituted for the original cost to date its own judgment as to what the investment of the railroads had been. Moreover, no attempt was made to present an analysis of the methods by which these several costs were obtained and the reason for their differences, if any. The final valuation was limited to a valuation for rate-making purposes, while it was held that the Commission had no right thus to restrict a valuation. It further appeared that the Commission had declined to make any allowance whatever for recognized elements of value which might be defined as intangible values. The Court said: "In making its valuation the Commission may have experienced difficulty in determining present value of the properties of the petitioners. The original cost to date should have been ascertained, as well as the cost of reproduction new and the cost of reproduction less depreciation. While these would not constitute decisive factors, yet they are 'matters for con-

sideration.' 'The weight to be given to such cost figures and other items or classes of evidence is to be determined in the light of the facts of the case in hand.' "

c. Ascertainment of value for consolidation and sale.

In Re Bridgeport Hydraulic Co. Docket No. 4922, June 28, 1927, the Connecticut Commission approved a consolidation of water companies based upon an agreed value made up of an appraisal computed as of December 31, 1919, with additions from that date at actual cost less depreciation of the appraised value of the depreciable property, modified, however, to the extent that for one of the companies the appraisal was scaled down so as to represent as of December 31, 1919, the minimum fair value of that company's property found by the Commission in a valuation for rate making. It was said: The setting up of a capital account for the consolidated company based upon said agreed value will not reflect an accurate statement of original cost as brought down to the date of consolidation, but such valuation is not in excess of a conservative valuation heretofore found by the Commission pertaining to the Bridgeport Hydraulic Company's property."

II. Nonphysical elements affecting value.

a. Overhead expenses.

An allowance for structural overheads of 15 per cent rather than 17 per cent was made in ascertaining the value of a gas system for the purpose of sale. Re Northern Indiana Pub. Service Co. (Ind.) No. 8701, March 18, 1927.

In Re Rolla Teleph. Co. Case No. 4884, June 1, 1927, the Missouri Commission said: "In making an appraisal based on a hypothetical reproduction cost, it is the practice to make an allowance for construction overheads but in this case the appraisal appears to represent actual investment costs incurred in reconstructing practically the entire exchange, within the last year. As stated by the engineer and by counsel of the company, this $5,000 item is wholly an estimate and not itemized in any way. If it represents no actual expenditure, it is difficult, and perhaps impossible, to say what part, if any, of this item should be included in valuing the plant, in view of the basis upon which the appraisal has been made."

Allowances were made of 5 per cent for omissions and contingencies, 10 per cent for contractor's profit, 5 per cent for engineering, 2 per cent for organization, legal, and administrative expenses, and 2 per cent for interest during construction, in ascertaining the reproduction cost of a water system. Brubaker v. Millersburg P.U.R.1928A.

Home Water Co. (Pa.) Complaint Docket Nos. 5411, 5412, Oct. 5, 1926.

No allowance was made in a rate valuation for the cost of obtaining money, where the evidence revealed that no cost was incurred. Ibid.

An allowance of $7,975 for all overheads of a water system was included in a reproduction cost new of $122,808. Hall v. Clarks Summit Water Co. (Pa.) Complaint Docket Nos. 6273–6276, 6296, Oct. 25, 1926.

An allowance of 5 per cent for omissions and contingencies in the valuation of a water system should not exclude machinery. Ibid.

Allowances in a rate valuation of a water company of 4 per cent for contingencies, 4 per cent for engineering, 4½ per cent for interest during construction, 2 per cent for organization, and 3 per cent for interest during construction, were held to be reasonable. Kittanning v. Armstrong Water Co. (Pa.) Complaint Docket No. 5858, Sept. 21, 1926.

An allowance of 15 per cent was made for overheads in the valuation of a street railway. Merchants Asso. of Shenandoah v. Schuylkill R. Co. (Pa.) Complaint Docket Nos. 5953, 5960, Dec. 13, 1926.

An allowance of 25 per cent for construction overheads is excessive for a small water plant in a rural community. Shaver v. Shavertown Water Co. (Pa.) Complaint Docket Nos. 6405 et al., Dec. 13, 1926.

b. Paving over mains.

The value of paving laid after the construction of water mains was excluded from the reproduction cost. Kittanning v. Armstrong Water Co. (Pa.) Complaint Docket No. 5858, Sept. 21, 1926.

III. Tangible property.

a. Property not paid for.

The cost of an excessive excavation in building a water line due to the filling in of low land, was not included in the reproduction cost where it appeared that the filling was not done at the cost of the company and that any cost of repairing the line would be charged to maintenance. Kittanning v. Armstrong Water Co. (Pa.) Complaint Docket No. 5858, Sept 21, 1926.

The amount of a future necessary investment for additions was included in the rate base, although the rates based on such investment were not allowed to become effective until the work had been completed at substantially the estimated cost. Re Wisconsin Teleph. Co. (Wis.) U–3443, Nov. 23, 1926.

b. Property not used or useful.

The loss from unprofitable extensions and improvements which were made without the approval of the Commission must be borne by the company in a condemnation proceeding. Ohio & C. Smelting & Refining Co. v. Public Utilities Commission, 68 Colo. 137, P.U.R.1920D, 197, 187 Pac. 1082 was cited. Public Service Co. v. Loveland, 79 Colo. 216, 245 Pac. 493, March 8, 1926.

In Re Mountain Water Service Co. Aug. 1, 1927, it was shown by the city and admitted by the water company that an amount of acreage had been computed in the company's valuation which was outside of the watershed and did not contribute to the flow. The New Jersey Commission, however, agreed with the company's counsel and held that inasmuch as the entire tract had been purchased by the company at a former order of the Commission it should be allowed to figure in the noncontributory acreage as a safeguard against pollution from encroaching building and to relieve the company of expensive police surveillance for prevention of contamination.

The value of the gas-producer plant and equipment of a water system, which is claimed to be held in reserve for the operation of pumps during emergencies when neither electric nor water power is available, was excluded from the property used or useful where the equipment had not been used for three years and it would take from one to two days to put it in condition. Brubaker v. Millersburg Home Water Co. (Pa.) Complaint Docket Nos. 5411, 5412, Oct. 5, 1926.

No allowance was made for the expense to a water company of drilling wells which proved to be unproductive, where information was lacking as to the actual drilling dates and the original cost, and there was no evidence as to whether or not the company exercised reasonable judgment in their location. Ibid.

The value of an auxiliary source of water supply which was in poor condition, had not recently functioned, and was a source only during the wet season when the ground was not frozen, was excluded from the cost of reproduction of a water company; and the value of a similar source was also excluded where the extent of the use was small, and it would be absolutely abandoned in the near future. Kittanning v. Armstrong Water Co. (Pa.) Complaint Docket No. 5858, Sept. 21, 1926.

The value of duplicate mains, which resulted from the purchase of plants of competing companies and which were to a large extent unnecessary for service, were excluded from the cost of reproduction of a water company. Ibid.

A value of an old pumping station of a water company which

is utilized for spare pumping facilities, but will not be used for such purpose when a new building is provided was included in the cost of reproduction, where it can be used in a small way for storage or rented after the removal of the old pumping equipment. Ibid.

c. Property paid for by consumers.

The value of fire hydrants and service connections which were paid for by consumers, were excluded from the reproduction cost. Kittanning v. Armstrong Water Co. (Pa.) Complaint Docket No. 5858, Sept. 21, 1926.

d. Working capital.

1. Materials and supplies.

An allowance of $790 was included for materials and supplies of a water system valued at $116,000; but no allowance was made for cash working capital, the majority of the consumers being on a flat rate basis and paying their bills in advance. Brubaker v. Millersburg Home Water Co. (Pa.) Complaint Docket Nos. 5411, 5412, Oct. 5, 1926.

An amount for construction materials was not included in an allowance to a gas company for working capital, materials, and supplies. Beaver Dam v. Wisconsin Power & Light Co. (Wis.) U-3373, Oct. 30, 1926.

An allowance for materials and supplies for a water system was made by a consideration of the average allowance for fourteen similar plants. Re Cudahy Bros. Co. (Wis.) U-3393, Dec. 21, 1926.

2. Specific allowance.

The sum of $1500 rather than $5000 for working capital, exclusive of materials and supplies, was included in the sum of $575,000 as reproduction cost less depreciation of a water company which collected its rates monthly in advance. Kittanning v. Armstrong Water Co. (Pa.) Complaint Docket No. 5858, Sept. 21, 1926.

An allowance of $30,000 was made for the working capital of a street railway valued at $1,950,000. Merchants Asso. of Shenandoah v. Schuylkill R. Co. (Pa.) Complaint Docket Nos. 5953, 5960, Dec. 13, 1926.

The Washington Department of Public Works, in Montesano v. Montesano Teleph. Co. No. 6023, July 27, 1927, allowed $1,434.41 as working capital of a telephone company when the fair value of the property was $49,342.72.

About one-twelfth of the annual operating expense of a water company was held to be a reasonable allowance for working capital. Re Cudahy Bros. Co. (Wis.) U-3393, Dec. 21, 1926.

IV. Intangible property.

a. Franchises.

An item "charter and permits to supply water" was not included in the reproduction cost of a water system. Shaver v. Shavertown Water Co. (Pa.) Complaint Docket Nos. 6405 et al., Dec. 13, 1926.

b. Going value.

An allowance of 10 per cent for going value was made in ascertaining the value of a gas system for the purpose of sale. Re Northern Indiana Pub. Service Co. (Ind.) No. 8701, March 18, 1927.

In Dixfield Light & Water Co. v. Itself, F. C. 632, Sept. 16, 1926, the Maine Commission held that no further stock should be added for going concern value except such as might be included in the allowance made in ascertaining reproduction cost less accrued depreciation with an allowance for working capital.

No additional allowance was made for going concern value where that value had been reflected within the items composing the valuation and there was no showing that the stockholders had suffered any sacrifice in the development of the business, it further appearing that there was a lack of competition owing to the practically monopolistic conditions under which the telephone companies operated in the state. Re Bucyrus Teleph. Co. (Ohio) No. 233, Aug. 8, 1927; Re Sidney Teleph. Co. (Ohio) No. 265, Aug. 9, 1927.

A claim of 8 per cent of the 10-year average reproduction cost for the going cost of a water system was not allowed, where it appeared that it was illogical to take such basis when the reproduction cost claimed was based on current prices, that no definition of "going cost" was offered nor any explanation of what was embraced in the claim of 8 per cent, that details were lacking with respect to earnings during the early period of the business, and that there was no evidence to show any lag in earnings. Brubaker v. Millersburg Home Water Co. (Pa.) Complaint Docket Nos. 5411, 5412, Oct. 5, 1926.

In a rate valuation of a water system with inadequate facilities and insufficient service it was held that no allowance should be made for going value in advance of the necessary improvements. Hall v. Clarks Summit Water Co. (Pa.) Complaint Docket Nos. 6273–6276, 6296, Oct. 25, 1926.

No allowance was made for the cost of developing a water business where the evidence was insufficient to show that any such cost was incurred. Kittanning v. Armstrong Water Co. (Pa.) Complaint Docket No. 5858, Sept. 21, 1926.

Going concern value cannot be ascertained by including in the rate base under that name mere good will as predicated upon earning capacity. United Fuel Gas Co. v. Kentucky R. Commission, 13 F. (2d) 510, April 22, 1925.

INDIANA PUBLIC SERVICE COMMISSION.

ARTHUR ROUNTREE

v.

INDIANAPOLIS STREET RAILWAY COMPANY.

[No. 9008.]

Labor — Cause for discharging motorman — Brawls.

A street railway company is justified in discharging a motorman for engaging in a brawl, followed by his arrest and conviction, by reason of which he missed his regular run, even though the brawl did not take place when he was on duty, especially when after a prior brawl he had been warned by the officials of the company that further misconduct would result in his dismissal.

[July 19, 1927.]

PETITION by a street car motorman for reinstatement as an employee; petition denied.

Appearances: Frank Baker, Attorney for petitioner; D. E. Watson, Attorney for Indianapolis Street Railway Company.

Ellis, Commissioner: On June 24, 1927, Arthur Rountree filed a petition with the Public Service Commission of Indiana asking that he be resinstated as an employee of the Indianapolis Street Railway Company, which petition, omitting the caption and signature, is as follows:

"Comes now the petitioner herein and says that he was employed by the Indianapolis Street Railway Company under a written contract which by the terms thereof provides that in the event this petitioner is discharged he may apply on the 2nd Tuesday of the month to the superintendent of said company for reinstatment and upon his refusal to reinstate, may on the 3rd Tuesday of the month appeal to the president of said company and upon his refusal to adjust the matter satisfactorily may appeal to the Public Service Commission from the decision of said president and said Commission are made the permanent board of arbitration.

"Petitioner says he does not have and can not produce a copy of said contract but that the same is in the possession of the Indianapolis Street Railway Company.

"Petitioner says that he was on or about June 10th discharged from said employment without cause and that he has complied

with the terms of said contract by appearing before said superintendent and president at the times provided in said contract and asked reinstatement and that this was denied.

"Wherefore petitioner asks that this body as a board of arbitration restore to him his employment and full time for all days lost by him as result of said wrongful discharge."

Pursuant to notice a hearing was held on the petition on July 18, 1927, at the rooms of the Commission, State House, Indianapolis, Indiana.

At the time of the hearing all parties agreed that the Commission has jurisdiction over this matter and that the petition is properly before the Commission.

The evidence showed that the said Rountree entered the employ of the Indianapolis Street Railway Company in 1923, and voluntarily left such employment within a few months. That he again took service with the company on July 7, 1926; that since August 1926 he has been employed as a motorman. That he was discharged from the service of the company on or about June 1, 1927. It appeared that the discharge of said Rountree took place after a fight with another employee of the company. That both parties to this brawl were arrested and that said Rountree was convicted in court for his part therein and the other employee was acquitted. The evidence before the Commission indicates that this fight took place in and near a pool room situated a short distance from the McLean Place Street car barns. That said Rountree was about to go on duty and that he missed his regular run on account of his arrest in connection with the fight. Rountree, upon examination by the presiding Commissioner, said that he was not in uniform at the time of this occurrence but upon further examination, admitted that he had on a portion of his uniform, it appearing that he had laid aside his uniform cap and coat prior to the altercation.

The evidence showed further that said Rountree, prior to the fight which resulted in his dismissal from the service of the company, had engaged in another brawl with an employee of the company. That subsequent to this fight, he has been warned by officials of the company that further misconduct of this kind would result in his dismissal. Counsel for the petitioner took the position that the company had no authority to discharge said

Rountree because the altercation in question did not take place when he was on duty. The motormen and conductors of the company are in constant touch with the public and it is the opinion of the Commission that the company is justified in insisting that such employees refrain from altercations and brawls of the nature in which it appears said Rountree has engaged.

The Commission, being fully advised in the premises, is of the opinion that the petition should be denied, and it will be so ordered.

It is therefore *ordered* by the Public Service Commission of Indiana, sitting as a board of arbitration, that the petition of Arthur Rountree for reinstatement as an employee of the Indianapolis Street Railway Company be, and it is denied.

Singleton, McCardle, Harmon, McIntosh, Commissioners, concur.

MICHIGAN PUBLIC UTILITIES COMMISSION.

RE MENOMINEE & MARINETTE LIGHT & TRACTION COMPANY.

[E-175.]

Discrimination — Rates — Contract — Unusual conditions — Electricity.

1. Rates under contract to a consumer involving extraordinary terms and conditions which no other consumer is in a position to receive cannot be termed discriminatory as aganist any other class of service, p. 88.

Rates — Jurisdiction of Commission as to rates fixed by contract — Electricity.

2. The Commission reserves the inalienable right to alter or amend rates at any time whether or not fixed by contract, and hence is not concerned with the length of time such a contract is to be effective, p. 88.

Rates — Duties of the Commission — Rate contracts — Electricity.

3. An order permitting the operation of a contract for special rates between a utility and a large consumer does not approve or disapprove of the contract but merely the conditions of service which affect rates and will require the extension of similar terms to all other consumers under like circumstances, p. 88.

[August 31, 1927.]

PETITION of electric utility for approval of a contract for sale of energy to industrial consumer; terms approved.

By the **Commission**: Upon petition of the Menominee & Marinette Light & Traction Company we are requested to approve of a contract for the sale of electric energy to the Michigan Electrochemical Company at and in the operation of its chemical plant.

It appears that the chemical company has been receiving service from petitioner for some time, and that under the terms of the contract now in effect such document expires September 5, 1927, and the chemical company wishes to continue to purchase electrical energy and petitioner wishes to supply electrical energy to the customer after the expiration of the present contract.

A new contract has been executed by the parties in interest, which provides for a different level of rates than those now in effect. It also provides that the rates as specified in the contract to be charged for service rendered thereunder are at all times subject to the approval and jurisdiction of this Commission.

[1] It is the understanding of the Commission that the service to be rendered by petitioner to the chemical company involves extraordinary terms and conditions, and that no other consumer of petitioner at present is situated to receive service under like conditions and, therefore, the rates for service to be rendered to the chemical company in no way can be termed discriminatory as against any other class of service.

[2] The Commission is not concerned with the terms of the contract, except as it may affect the rates and charges which will accrue under the contract. In other words, we cannot approve the length of time the contract is to be effective and, as a matter of fact, it makes no difference, whatever, as to the term of the contract as it applies to the rates and charges for service to be rendered under said contract, because this Commission reserves to itself the right to change, alter, or amend said rates at any time, either upon its own motion, or upon proper petition which may be filed by any interested party in pursuance to the statute.

[3] No utility, whose rates are under the jurisdiction of the Commission, has the right to make any contract which provides

for the maintenance of a fixed rate or charge for any length of time. In other words, the execution of a contract between any two parties cannot abrogate the statute. This order, therefore, will not approve or disapprove the contract which has been executed between the parties in interest, but will merely approve the rates and conditions of service which affect the rates. Our order will also require petitioner to apply these rates to any other customer under like circumstances and conditions, if there be at any time such a consumer.

Now, therefore, it is hereby *ordered,* that the Menominee & Marinette Light & Traction Company be and it is hereby authorized to put into force and effect, as of September 5, 1927, the power rate schedule as set forth in said contract made the 4th day of May, 1927, between the Menominee & Marinette Light & Traction Company and the Michigan Electrochemical Company.

It is *further ordered,* that the Menominee & Marinette Light & Traction Company apply the above mentioned rate schedule to any and all consumers who are at any time able to comply with like or similar terms and conditions upon which this rate schedule is based.

It is *further ordered,* that a copy of the contract made between the Menominee & Marinette Light & Traction Company and the Michigan Electrochemical Company made on the 4th day of May, 1927, be filed in the offices of this Commission in accordance with our rules and regulations.

Note.—Discrimination.

I. Rates of particular utilities:
a. Automobile, 89.
b. Railroad, 90.
c. Telephone, 92.
d. Water, 94.
II. Concessions to particular parties, 94.

I. Rates of particular utilities.

a. Automobile.

In Canary Taxicab Co. v. Terminal R. Asso. No. 27022, — Mo. —, 294 S. W. 88, Feb. 15, 1927, Atwood, J., in a case in which the right of a terminal railway company to exclude other taxicab

drivers than a single one with which it had a contract was sustained, said: "The law is well settled that hackmen and taxicab drivers may be prohibited from soliciting patronage on railroad station grounds, but there is some conflict of opinion upon the question of the right of a railroad company to grant such a right to a favored person to the exclusion of all others of like vocation. However, the decided weight of authority particularly reflected in the more recent and seemingly better reasoned decisions, including those of the Supreme Court of the United States, is to the effect that a railroad company, as long as it thereby affords reasonable accommodation to the public and violates no constitutional or statutory provision, may grant such exclusive privilege to one company or person."

In Re Motor Vehicle Freight Classification, F-A-72, P. S. C. Or. Order No. 1512, July 30, 1927, the Oregon Commission decided that where motor carriers had published schedules classifying candy, etc., as second class shipments, and general groceries including 60 per cent of fourth class articles as fourth class shipments, the practice of permitting grocery shippers to ship 40 per cent candy with groceries at fourth class rates was unjust and discriminatory of confectionery shippers compelled to ship candy exclusively. An amendment in the schedule was ordered.

b. Railroad.

In Re Cleveland, C. C. & St. L. R. Co. No. 15742, June 29, 1927, the Illinois Commission ordered a railroad company to collect from a company upon the property of which an industrial track was located, the cost of reconstruction of the track which had been extended by the railroad or to remove the track and cease rendering service thereon. The Commission said that although it had no jurisdiction to render judgment against any party or to assume any judicial functions whatever, the evidence indicated beyond any question that whatever repairs had been undertaken by the railroad company were necessary and were beneficial to whatever company was occupying the present industrial site. It was said further: "The Commission believes under all the facts and circumstances that the petitioner railway company should not be allowed to maintain the track in question under discriminatory circumstances as related to other industries not only on its own line but on the line of other railroads."

The petitioner, a stone shipping company, in National Stone Co. v. Chicago, M. & St. P. R. Co. No. 17483, July 29, 1927, asked for an investigation as to the cause of difference in level of proportionate rates from its plant in Joliet, Illinois, as compared with rates to the Brownell Company at Thornton, Illinois. In order-

ing an adjustment of the relative rates, the Illinois Commission said: "We further find that to the extent that the defendants herein participate in rates for the transportation of crushed stone from Thornton, Illinois, to destinations hereinafter stated, lower than or in excess of the following rates which we here find to be appropriate, the said defendants participate in rates which we find to be unjust, unreasonable, and unduly discriminatory."

In Red Top Cab Co. v. McGlashing, — Iowa, —, 213 N. W. 791, May 10, 1927, the supreme court of Iowa held that a railroad had the right to grant an exclusive privilege to a cab company on its property adjacent to a city station platform notwithstanding the objections of a rival cab company. Morling, J., delivering the opinion, said: "The defendants' contention is, not that they have a property interest in or right of entry on the railroad land, but that the companies have assumed to perform without discrimination a public service, and that the lease in controversy is discriminatory, and tends to a monopoly. A railroad company as a common carrier may not discriminate between patrons or grant one or one class advantages over others. The defendants, however, are not patrons of the railroad companies, and are not demanding the service for the performance of which the companies were created, and which they are required to render to all members of the public alike. The defendants have no standing to set up the rights of patrons. The carrier performs its duty to its patrons when it affords reasonable and proper means of access and exit to and from its premises without preference or discrimination. It is not required to look after their transportation to or from its premises. . . . Without further elaborating, we think that such contracts when not arbitrary or unreasonable (and the one under consideration is not), should be sustained in accordance with the holding of the great majority of the courts which have passed upon the question [numerous cases cited], and see other cases cited 10 C. J. 657. The supreme court of Michigan, while formerly recognized under Kalamazoo Hack & Bus Co. v. Sootsma, 84 Mich. 194, 47 N. W. 667, 10 L.R.A. 819, 22 Am. St. Rep. 693, as adopting the doctrine of the last cited cases [holding contrary view] in Dingman v. Duluth, S. S. & A. R. Co. 164 Mich. 328, 130 N. W. 24, 32 L.R.A.(N.S.) 1181, distinguished the former case, and on the question then before it put itself in harmony with the majority rule. See 10 C. J. 659. Most of the courts adopting the doctrine of invalidity of such contracts were committed to it before the question was passed upon by the Supreme Court of the United States in Donovan v. Pennsylvania Co. 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91. If we were otherwise in doubt on the question, we should give much weight to the consideration that

the Federal rule has become firmly settled. In Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co. (C. C. A.) 15 F. (2d) 509, that rule was accepted as a principle of general jurisprudence, and applied in opposition to the one adopted by the court of last resort of the state. A rule that would result in such diversity and conflict ought not to be adopted, in the absence of compelling reasons therefor."

In Seaboard By-Product Coke Co. v. Atlantic City R. Co. Aug. 31, 1927, the New Jersey Board of Public Utility Commissioners decided that a railroad carrier may not charge higher rates for the transportation of manufactured products from plant to destination because of the fact that the crude products are shipped to the plant by water instead of rail.

In Davison & Brother v. Pennsylvania R. Co. Complaint Docket Nos. 5855, 6951, 7079, Aug. 8, 1927, the Pennsylvania Public Service Commission upon complaints by various sand and gravel companies that the rates on sand and gravel from pits and hoists in western Pennsylvania were unreasonable and preferential on slags and crushed stone, said in the course of its opinion: "It has come to be generally recognized that the rates on sand, gravel, crushed stone, and slag shall be on the same level. The respondents appear to have no objection to that basis provided the lower rates on slag are raised to the higher level. Crushed slag weighs less per cubic unit of measurement than do the other commodities, and, therefore, is at a commercial advantage even when the freight rate is equal to that applicable to the other commodities. There would appear to be no sound reason from a transportation standpoint why lower rates should apply to slag than to the heavier loading commodities. Concerning the differential for joint hauls we are of the opinion that the record affords no convincing reasons why it should not apply to these low grade and low rated commodities. The fact that one level of rates applies on pig iron which is a heavier loading higher rated commodity is not persuasive." A uniform rate on all of these commodities was ordered.

In United States v. Northern P. R. Co. No. 4286, 18 F. (2d) 299, Feb. 21, 1927, it was held that payments by a railroad company to lessee shippers in settlement of claims for damage arising from a relocation and elevation of tracks required by a city ordinance, when made on advice of competent counsel, could not be considered a device indirectly to grant concessions on freight rates to the lessees.

c. Telephone.

A provision of a telephone schedule requiring subscribers residing over five miles from the central office to pay an additional

charge of $3 a year, which affects a small number of subscribers, some of whom own a part of their service lines, was held to be an improper discrimination. Re Bunker Hill Teleph. Co. (Ill.) No. 15076, March 9, 1926.

An allowance of 50 cents a month to patrons of a mutual telephone company using their own instruments is unreasonable where the regular rate is $1 a month for company instruments; and the allowance was reduced to 30 cents a quarter. Re Cartersburg Teleph. Co. (Ind.) No. 8590, Aug. 20, 1926.

In Re Rushville Co-op. Teleph. Co. No. 8833, Aug. 19, 1927, the Indiana Commission refused to approve a uniform increase of rates asked by the petitioner for three cities which were served and ordered no increase in one of the cities, saying in its opinion: "It was disclosed that it was the present intention of petitioner to rebuild one of its existing plants; namely, Rushville, and to do nothing whatsoever to the Glenwood exchange for the reason that it was in first-class condition at the time of the hearing, nor to Milroy because of the fact that it should be completely rebuilt as an automatic exchange and other repairs would probably be almost wasted. Petitioner asked to be allowed to increase all its rates uniformly in each of the three exchanges. It was apparent that while an increase was justified for the Glenwood and Rushville exchanges, it was not justified as applied to Milroy for the reason that the Milroy service would not be improved except in its connection with Rushville and Glenwood and no improvements were contemplated until after the repairs and rebuilding at Rushville had been fully completed."

The Nebraska Commission, in Citizens Teleph. Co. v. Sutherland Teleph. Co. Informal Complaint No. 7432, March 21, 1927, approved the application of the plaintiff company to discontinue a free switching service with the defendant company upon disclosure of the fact that the latter was a rural line with only thirteen subscribers and the reciprocal advantages of such free service very unbalanced, and further that several other rural lines such as the defendant company were being charged a rate of 60 cents a month for such service. The custom of free service arose from an old agreement between the two companies for which the Commissioners could find no present reason.

A provision of a franchise ordinance requiring a telephone company to furnish to the municipality and to each fire company a pay station telephone that requires prepayment to get a call was held to be a departure from the filed schedule of rates, and hence a preference in contravention of a statute forbidding discrimination. Re New York Teleph. Co. (N. J.) July 27, 1926.

d. Water.

The failure of a water company which purchases its supply to make a charge to building contractors assuming the cost of the service line is an unjust practice that should be discontinued. Evert v. Kulpmont Water Co. (Pa.) Complaint Docket No. 6787, Dec. 20, 1926.

II. Concessions to particular parties.

Other conditions being equal, the exercise by a railroad company of its power under the terms of a lease to terminate the same for the purpose of granting the premises to the principal competitor of its lessee, is an act of most unreasonable discrimination, and, therefore, in violation of the statute requiring railroad companies to furnish on its vacant right of way, sites for private elevators or warehouses under reasonable conditions and regulations and at a reasonable rental without unreasonable discrimination. Kenosha Sand & Gravel Co. v. Chicago & N. W. R. Co. (Wis.) R-3317, July 26, 1926; Aug. 17, 1926.

In the leasing of warehouse sites on a railroad right of way, an existing industry already occupying a site, other things being equal, should be given preference over another company desiring a lease of the same premises, especially where transfer of the lease from the existing company to the other company would result in a monopoly of the business. Ibid.

The question whether a site on a railroad right of way should be leased to one company or another does not depend primarily upon the amount of business done by the two companies. Ibid.

MISSOURI PUBLIC SERVICE COMMISSION.

JACOB HANDELMAN

v.

UNION ELECTRIC LIGHT & POWER COMPANY.

[Case No. 5249.]

Service — Discontinuance — Unlawful diversion of current.

Evidence of the unlawful diversion of electric current by tampering with the meter justifies a requirement that the patron install a lock box at his own expense, and that the company render service for a test period of one year to show whether the bills will show a substantial disagreement with previous years during which the question of diversion and the amount is in dispute, when the patron denies unlawful diversion and offers to pay the estimated loss of revenue if the bills show substantial disagreement.

[July 27, 1927.]

P.U.R.1928A.

COMPLAINT against the discontinuance of service because of alleged diversion of electric current; renewal of service for a test period ordered.

Porter, Commissioner: This case is before the Commission upon the complaint of Jacob Handelman, hereinafter called the complainant, versus Union Electric Light & Power Company, hereinafter called the defendant. A hearing was held at the offices of the Commission in Jefferson City on June 30, 1927. At this hearing the complainant was represented by Mr. Max Sigoloff and the defendant by Mr. Thomas Bond.

In this case the Commission has to consider contradictory statements of fact. In doing this we will first consider the story related by the complainant and his witnesses in their testimony. The complainant lives at 774 Harvard avenue, University City, Missouri. He owns a modern home of six rooms in which he has besides his electric lights, certain electrical appliances, to wit: an electric iron, an electric washing machine, an electric fan and in one room electrical logs for heating. The complainant dwells in this home with his wife, his son, his daughter, and daughter's husband. Complainant had for his witnesses his wife and his son. All testified that though these electrical appliances were in the house they were very seldom used and that even the lights were not used much as the business of complainant, his daughter, his son, and son-in-law, was such as to cause them to be out until late every night and that his wife would visit with her mother or go to some other place. They stated that the laundry was done outside the house. They further testified that on May 9th, Mrs. Handelman was in the yard with her daughter repairing some rose trellises that were blown down by a storm and suddenly a man appeared at the door of their basement and called to them. He requested Mrs. Handelman to go into the basement with him and proceeding to the meter, showed that the meter was not registering because the revolving disc had been stopped by the insertion of a hairpin through the opening under one of the wing nuts which holds the cover of the meter on. Mrs. Handelman denied all knowledge of how the hairpin happened to be there and the man removed the hairpin after telling her that it would be

reported. The complainant was notified that his current would be cut off and he went to the county offices of the defendant and interviewed Mr. Sandford, the treasurer who has charge of such matters. He was informed by Mr. Sandford that he would have to install a lock box over the meter at his own expense and at the same time pay for the company's estimate for diverting current which was based on a period of eighty months at $5 per month or a total of $400. The complainant stated that he would not pay this, as it would be an admission of guilt and that he was not guilty. Complainant offered, at his own expense, to allow the company to install a lock box for a period of six months and then at the end of that period if the amount of current used showed a discrepancy when compared with that used during the preceding seven years, he would pay the $400 estimate. The defendant declined this offer and on May 11th removed the meter. Complainant stated that had lived in St. Louis and suburbs for thirty-seven years; that he had been a large customer of the company as he had leased a building in St. Louis and sublet the various floors. Complainant offered in evidence the billing of one of his sub-lessees which showed a consumption of 1 kilowatt for one month. He claimed that this sublessee had two or three light going all day long.

The defendant in presenting their case said that they had been suspicious of the household for some time. The bills for the seven years show that with one exception, complainant has only paid slightly over the minimum bill per month. Defendant thought that this was unusual considering the neighborhood and the number of electrical appliances in the household. On Saturday, May 7th the meter-reader went to the home and upon rapping on the basement door, heard Mrs. Handelman descend the steps and go to the meter before she opened the door for his entrance. He reported this to the office and on May 9th the assistant chief meter-reader for the defendant was in the neighborhood checking up and from two doors up the block saw two ladies in the yard taking down some clothes. He walked into the complainant's yard and called "electric man" and went into the basement where he saw two lights burning. He went over to the meter and noticed that it was not registering. He ex-

amined it and discovered that a hairpin had been inserted in such a manner as to stop the revolving disc. He then walked to the door and called to the complainant's wife and upon getting her to enter the cellar showed her the hairpin and asked her who had put it in the meter. He claimed that the meter had read 536 kilowatts on May 7th, and that when he read it on May 9th it still read 536. Defendant testified that two days later on May 11th, when the meter was removed, it read 540, a usage of 4 kilowatts in two days.

Defendant filed an exhibit which showed that from September 1920, to and inclusive of April 1927, complainant's bills had run from 0 to 12 or 14 kilowatts with the exception of one month at which time 70 kilowatts were registered. The meter, that had been removed, was presented as an exhibit in the case. The defendant called attention to the fact that on said meter the right wing nut was dull, the result of oxidization, and that the left wing nut, under which it was alleged the hairpin had been inserted, was bright as if it had been used more frequently. Defendant likewise called attention that the case under the left-hand wing nut was bent down about $\frac{1}{8}$ of an inch and that the paint on the left edge of the case, which is under the left wing nut, had been rubbed off. Defendant then removed the cover and called attention to where the paint on the left magnet had been scratched and also to several scratches made by some sharp instrument on the revolving disc. The defendant further stated that the diversion of current had become a serious matter for them; that there had been over 1200 cases suspected since the first of the current year and that they had found guilty 291, and that they were making intensive efforts to bring a stop to this practice.

As stated in a preceding opinion, the unlawful diversion of electric current is a serious matter and one that it is extremely difficult for the electrical utilities to combat. It is so recognized and has been made a misdemeanor under the laws of Missouri (Revised Statutes of Missouri 1919, §§ 3355 and 3357).

The Commission through its concern in all of the customers of a utility must be in sympathy with all efforts of the utilities to protect these and themselves from such losses. The testimony in

the present case is contradictory. The Commission, in the view of all the testimony, will only render such a verdict as will in its own opinion protect the interests of the customers of the electrical utility and at the same time not close the doors upon the complainant for redress. Complainant offered at his own expense to allow the defendant to install a lock box for a test period of six months and to pay the estimated loss of revenue if the bills should show substantial disagreement with the previous seven years. The Commission is of the opinion that this should be done but that the test period should be for one year.

Brown, Chairman, Ing, Calfee and Porter, Commissioners, concur; Hutchison, Commissioner, absent.

NEW JERSEY BOARD OF PUBLIC UTILITY COMMISSIONERS.

RE JOSEPH K. CHOATE AND JOSEPH P. TUMULTY,
Receivers of Morris County Traction Company.

Certificates of convenience and necessity — Power of Commission — Consent of municipality.

1. No formal refusal of a municipality along a proposed bus route is necessary to give the Board of Public Utility Commissioners discretion to act on an application under a law providing that after due application of a proposed transit utility and refusal of consent by any municipality along the route, the Board might then grant a certificate to operate through the same provided no local business was done there, p. 101.

Certificates of convenience and necessity — Preference of existing utility although insolvent — Busses.

2. The receivers of an existing trolley service were given preference in the establishment of a bus route over the old traction routes over an objection as to their financial soundness, where it appeared that a refusal of the application might bring about a total abandonment, and that none of the other applicants, individually or by combination, were prepared to operate over the full extent of the old trolley line, p. 102.

Certificate of convenience and necessity — Conditions as to promptness in establishing service.

3. In order to prevent the receivers of an existing trolley line from acquiring the right to operate busses over the old traction routes for speculative purposes only, a certificate was granted with a condition subsequent of prompt installation of actual service, p. 103.

[August 31, 1927.]

APPLICATION of receivers of traction company for approval to run auto busses in lieu of traction cars over its routes; granted.

Appearances: Elmer King for the petitioners; Harry V. Osborne for the Somerset Bus Company, B. & N. Transportation Company, Boonton-Mt. Lakes-Newark Bus Line, and De Camp Bus Lines; N. C. Toms for the town of Morristown; Charles W. Weeks for the township of Springfield; Henry Pilch for the borough of Madison; J. H. Dabaghian for Tri County Transportation Company.

By the **Board**: This is an application by Joseph K. Choate and Joseph P. Tumulty, receivers of the Morris County Traction Company, for approval of municipal consents to operate auto busses in lieu of trolley cars over the present main line and connecting branches operated by the said receivers from Landing, Lake Hopatcong, Morris county, through the various municipalities in which the cars now operate, to Maplewood, Essex county, New Jersey.

By agreement with the Public Service Railway Company, through cars are operated by the Morris County Traction Company beyond Maplewood over the Public Service Railway Company's tracks through Irvington and Newark to the Public Service Terminal, in Newark.

The petitioners request approval of municipal consents or permits to substitute auto busses for trolley cars on its lines now operated from Landing, Lake Hopatcong, Morris county, New Jersey, to and including Maplewood, New Jersey, and intermediate points along the following route:

Route No. 1: Starting at Landing, along County Road to Culvert, thence along State Highway Route No. 5 to Ledgewood, thence along County Road to Sucasunna, thence along County Road to Kenville, to State Highway Route No. 5, continuing on said route to Dover, thence along Blackwell street, Dover, to State Highway Route No. 5, continuing on State Highway Route No. 5, through Rockaway, Denville, Mt. Tabor, Morris Plains, to Morristown Park, the terminal of this route to be at Sneeden's Crossing-Morris township, thence along Park Place to Morris street, to Washington avenue, to Sneeden's bridge.

Route No. 2: Starting at terminal at State Hospital-Greystone Park, thence along state hospital road to Stiles avenue, along Stiles avenue, to Glen Brook Road, along Glen Brook road to Dover road, along Dover road to Speedwell avenue, Morris Plains, along Speedwell avenue (State Highway Route No. 5) to Park Place, Morristown, thence along Park place to Morris street, to Elm street, in Morristown, thence along Elm street to South street, along South street to State Highway Route No. 5, thence along State Highway Route No. 5 to West street, Madison, thence along West street to Elm street, thence along Elm street to Park avenue, thence along Park avenue to Main street, thence along Main street (State Highway Route No. 5), in Madison and Chatham, to River road, in the city of Summit, thence along River road to Morris avenue, to Park avenue, thence along Park avenue, to Denman place, to County road (Morris avenue), thence along Morris avenue to State Highway Route No. 5, in Springfield township (Farmer's Hotel), thence along State Highway Route No. 5 (Springfield avenue), to Springfield Junction, from Springfield Junction to Main street, thence along Main street to Millburn Center, from Millburn Center along Millburn avenue to Maplewood.

Route No. 3: From Denville Junction along State Highway Route No. 12 to Mountain Lakes, thence along County Highway to town of Boonton, thence along Main street, Boonton, to Myrtle avenue, to Van Ralte silk mill, in town of Boonton.

Route No. 4: Beginning at Kasners Corner in Wharton, thence along Main street to Wharton Junction, thence along Blackwell street to Bergen street, Dover, thence along Bergen street to State Highway Route No. 5, thence along State Highway Route No. 5 to Rockaway, Delaware, Lackawanna & Western Railroad station.

Route No. 5: Starting at the terminal at Morris and Park avenues, in Summit, thence over same streets as Route No. 2 between Summit and Maplewood.

The foregoing routes are now served by the trolley lines of the Morris County Traction Company.

Summer service is now operated by busses between Landing, Stanhope, Netcong, and Bertrand Island.

P.U.R.1928A.

The purpose of the present application is to motorize the entire system of transportation in the territory now served by street railways operated by the receivers of the Morris County Traction Company and it is claimed that such service would be a substantial benefit to the municipalities to be served.

Municipal consents in various forms have been obtained from the following municipalities: Township of Boonton, town of Boonton, borough of Chatham, township of Denville, town of Dover, township of Hanover, borough of Madison, town of Morristown, borough of Morris Plains, township of Millburn, township of Morris, township of Mine Hill, borough of Mt. Lakes, borough of Rockaway, township of Rockaway, township of Roxbury, city of Summit, and the borough of Wharton.

The rates of fare on the busses to be the same as on the trolleys, that is, a base zone rate of 10 cents per passenger per trip.

At the opening of the hearing, the town of Morristown and the township of Springfield objected to the granting of the prayer of the petition but before the close of the hearing, Morristown withdrew its objections and filed its consent with some conditions attached.

[1] Springfield has granted no consent and objects to the substitution of busses on the ground that the receivers have not obtained the consent of the various municipalities within the meaning of the statutes; that they are not the proper parties to whom a franchise should be granted and have not shown themselves financially equipped to operate a bus system. Further, that the application is premature as the township of Springfield has neither failed nor refused to grant its consent.

All of the other municipalities, some eighteen of them, have consented to the substitution. Springfield is the only exception. It appears that application was duly made to the township for such consent, that negotiations followed between the representatives of the receivers and the township but no conclusion has been reached. The contention of counsel is that the application is premature because Springfield has neither failed nor refused within the meaning of the statute.

The provision of the Law of 1926 is:

"Whenever the route of any auto bus extends through more

than two municipalities and one or more municipalities have granted consent for such operation and the Board of Public Utility Commissioners has approved such consent and one or more municipalities have refused or failed to grant the necessary consent, in such cases the Board of Public Utility Commissioners may permit the holder of such consent so granted and approved to run his auto bus through the municipality or municipalities which have refused or failed to grant the necessary consent; provided, that no passengers be either taken on or discharged from said auto bus anywhere within the boundaries of the municipality or municipalities so refusing or failing to grant such consent; and provided, further, that nothing herein contained shall be held to entitle any such municipality which has refused or failed to grant such consent, to any proportion of the 5 per centum franchise tax herein imposed."

The evident purpose of this legislation is not to permit a municipality, which for any reason withholds its consent, to interfere or prevent the operation of busses when such operation is convenient and necessary to adjacent municipalities, and to the operation of which they have consented. Springfield has not made any formal refusal, but obviously it has failed to grant consent, and its attitude at the hearing, in opposition to the petition, might be considered, so far as this application is concerned, a refusal.

[2] Another objection by the township is that the receivers have not shown themselves to be financially and otherwise equipped to operate the proposed bus system, and further, that they are not the proper parties. This objection has also been stressed by counsel for some of the bus lines which appeared in opposition.

The interest of the bus companies in this application is due to the pendency before this Board of applications by them to lift restrictions and to parallel to some extent the trolley line. These applications have been considered in connection with the present case and some have been granted, so far as public convenience and necessity seem to require.

But even if the applications were granted in their entirety and the restrictions lifted, the service furnished would cover

only a small portion of the route (what might be considered as the best paying portion), while a larger area would be without local service. In considering this case, the Board has not overlooked the fact that a refusal of the application might bring about a total abandonment of the trolley which would result in a very serious inconvenience to the localities which could not be served profitably if severed from the other parts of the route.

The receivers are officers of the United States District Court and have no personal interest in this application except as they are carrying out the orders of the Court in the conservation of the property, and nothing has appeared to question their good faith in this application.

The objection was made that the testimony does not show that the receivers have the financial ability to equip and operate the proposed bus system. The meagre references to the matter in the testimony are supplemented by the statement of counsel for the receivers that application would be made to the United States District Court and if that failed, the bond holders' committee, by virtue of its interest, would take over the property at the sale. There is also an intimation of negotiations looking to a lease to the Public Service Corporation. It is plain that the ultimate purpose of the receivers is to conserve the property and in this they have the support of the bond holders' committee. Anything that can be accomplished in that direction, so long as it can be done without detriment to or interference with the interests of the traveling public in this locality, will not be regarded with disapproval by this Board, especially as the objections presented by the objectors are all based on matters which are largely under the jurisdiction of the Board and can readily be controlled by it.

A similar application in 1926 made by the receivers to substitute busses for trolleys between Springfield and Elizabeth was granted by this Board. Conditions at the present time are different only because of the fact that an order of sale has been signed by the court and if an order to substitute busses is made by this court the sale will be subject to that order and the conditions imposed.

[3] It may be true as stated by counsel that an approval of this application will give added value to the property of the

trolley. The Board does not propose to approve these permits merely to permit the receivers or bond holders' committee to take advantage of that fact and to speculate with them but will impose a condition that unless the busses are actually provided and that transportation is furnished over the route now covered by the trolley the approval will be withdrawn. The primary consideration of the Board is the protection of the residents along the line of the trolley. Permission to abandon the trolley will be granted, however, the Board reserving the right to issue an order at some future time concerning the removal of the poles and overhead line and also the removal of the tracks and the replacement of the pavement. That the convenience of the public requires transportation covering practically the entire route is amply shown by the large number of passengers carried by these trolleys.

The problem which confronts the Board in the present application is rather perplexing but after careful consideration it seems that in the absence of any other application for the operation of busses in the entire territory that it would be in the best interest of the public to afford the petitioner an opportunity to provide bus service and this must be accomplished within a reasonable time. The testimony indicates that it will require about thirty-five busses to provide service at the present time in substitution for the street railway service.

Upon consideration of the evidence, therefore, the Board finds and determines that the municipal consents granted for said operation are necessary and proper for the public convenience and properly conserve the public interest and approves of the same upon the following conditions:

1. That said approval shall be subject to such rules, regulations, or conditions now in force and as the Board may hereafter impose.

2. That said approval shall be revocable for violation of the Board's rules, regulations, or conditions or for other good cause, or failure to make the substitution to busses within a reasonable time.

3. That all state laws and municipal regulations must be fully complied with before these consents become effective.

4. That the rates of fare charged by the petitioner shall not be changed without the approval of this Board.

Note.—Certificates of Convenience and Necessity.

I. When certificate is required, 105.
II. Operation in good faith prior to regulation, 106.
III. Consent of other governmental bodies, 106.
IV. Reasons for granting or refusing:
a. In general, 106.
b. Character of applicant, 107.
c. Illegal practices, 108.
V. Evidence of necessity, 108.
VI. Scope, 110.
VII. Assignment, transfer, and sale, 111.
VIII. Revocation, 112.

I. When certificate is required.

In San Francisco, N. & C. R. Co. v. Western Motor Transport Co. Decision No. 18483, Case No. 1626, June 9, 1927, the evidence presented sustained the allegations of the complainant that the defendant had by tariff publication and without authority required by statutory law, held itself out to the public as a common carrier of passengers by auto stage for compensation, between local points prohibited in its certificate. In directing the discontinuance of such unauthorized and illegal operation the California Commission restated a former decision: ". . . wherein the principle was established that no transportation company subject to regulation by this Commission under the authority conveyed by chapter 213, Statutes of 1917, and effective amendments thereto could enlarge or expand operative rights beyond those existing as of May 1, 1917, or subsequently granted by this Commission by a certificate of public convenience and necessity unless a certificate of public convenience and necessity as provided for in the statutory law had been issued by the Commission following application therefor and affirmative showing by an applicant."

The Colorado Commission granted applications for certificates of convenience and necessity to exercise franchise rights assigned to a power company although the alleged rights or privileges had been exercised prior to filing the applications for Commission orders. The Commission said that as there had been some doubt on the part of some people as to the necessity for a certificate of convenience and necessity being granted before exercising such assigned rights or privileges, it had concluded not to deny the certificates on account of the failure to secure the Commission orders. Re Public Service Co. Application No. 805, Decision No. 1342; P.U.R.1928A.

Re Public Service Co. Application No. 560, Decision No. 1343; Re Public Service Co. Application No. 807, Decision No. 1345; Re Public Service Co. Application No. 806, Decision No. 1346; Re Public Service Co. Application No. 808, Decision No. 1348; Re Public Service Co. Application No. 735, Decision No. 1350; Re Public Service Co. Application No. 799, Decision No. 1351; Re Public Service Co. Application No. 559, Decision No. 1352; Re Public Service Co. Application No. 722, Decision No. 1353, June 24, 1927.

II. Operation in good faith prior to regulation.

A motor vehicle system that was existent prior to the statute requiring a certificate is entitled to the same. Re Bressan (Colo.) Application No. 796, Decision No. 1215, April 6, 1927.

Upon application for a certificate of convenience and necessity by a person who has been operating as a common carrier prior to July 16, 1917, at which time § 35 of the Public Utilities Act of Colorado became effective, nothing remains for the Commission but to grant a certificate, the operator being considered as a public utility in operation prior to the effective date of requiring certificates of public convenience and necessity. Re Sandoval, Application Nos. 868, 869, Decision No. 1237, May 26, 1927.

III. Consent of other governmental bodies.

It is not sound policy to permit the vesting of an important operative right merely upon a narrow technical construction of Commission decision, it being well established that grants of franchises and special privileges by the state to private persons or corporations are to be construed most strongly in favor of the public, and that where the privilege claimed is doubtful nothing is to be taken by mere implication as against public rights. Re California Transit Co. (Cal.) Decision No. 18107, Application No. 11005, March 28, 1927.

IV. Reasons for granting or refusing.

a. In general.

A motor vehicle owner will not be granted a certificate to charter or rent busses to wherever patrons may desire to use the same, in the absence of evidence that public convenience and necessity requires such service. Re Bensberg (Colo.) Application No. 756, Decision No. 1204, March 29, 1927.

In Re New York, N. H. & H. R. Co. Docket No. 4890, May 5, 1927, the Connecticut Commission denied for the present a certificate authorizing a motor bus route in view of existing congestion of motor traffic along the proposed route and a hazard created to

such traffic by establishing a terminus at a junction of two roads where the motor busses would have to be turned around.

A certificate of convenience and necessity should not be granted to an independent railroad merely for the purpose of connecting between two points of an existing railroad where the new company is acting for and is under the control of the existing railroad; since this is not consistent with the purpose of the Public Utilities Act to bring under public control for the common good property applied to a public use in which the public has an interest. Roy v. Illinois Commerce Commission ex rel. North Shore Connecting Railroad, No. 17477, 322 Ill. 452, 153 N. E. 648, Oct. 28, 1926.

b. Character of applicant.

A certificate of convenience and necessity for the operation of motor bus lines will be granted to an applicant who is able properly to finance the undertaking and whose officers and managers are all men of a long number of years' experience in the utility and transportation field, rather than to one who has not shown that it is able to finance the undertaking. Re Chicago & J. Transp. Co. (Ill.) Nos. 15233, 15046, Jan. 12, 1926.

In Re Kankakee-Gilman Bus Line, Nos. 13576, et al. July 29, 1927, the Illinois Commission granted application of the Pierce Arrow Bus Company over four rival applicants because it was apparently better able to take care of the large traffic occasioned by the suspension of a former traction company operating in that territory. The Commission said: "The Commission further finds that public convenience and necessity will be best served by the granting of a certificate of convenience and necessity to one of the applicants herein which the Commission believes to be best fitted and qualified to render the motor coach service which public convenience and necessity require and by the denying of each of the applications filed by each of the other applicants herein."

A certificate of convenience and necessity should not be granted to an independent railroad company for the operation of a connecting line between two points on an existing railroad in the absence of evidence of financial ability of the new company to serve the public interest. Roy v. Illinois Commerce Commission ex rel. North Shore Connecting Railroad, No. 17477, 322 Ill. 452, 153 N. E. 648, Oct. 28, 1926.

A certificate to operate a telephone system will not be granted where there is a grave doubt as to the ability of the applicant to furnish the service. Re Winn (Mo.) Case No. 4798, July 29, 1926.

In Re Jersey City-Greenwood Lake Bus Co. Sept. 20, 1927, the New Jersey Commission refused approval of municipal consent for the operation of auto busses between certain towns, the evidence

showing that the patronage sought to be attracted was of a seasonal character and probably not sufficient to pay operating expenses at the peak of the season. The Commission stated: "An ill-considered venture should not be encouraged. On the petitioner's own showing, it will probably be a losing operation. It would be of no permanent benefit to the public and would result in unnecessary competition with the utilities now operating along this route. Public necessity and convenience should at least demonstrate that a bus route may be operated at a reasonable profit. The evidence does not establish that additional transportation facilities are required to serve this route."

c. Illegal practices.

An application for a certificate of convenience and necessity to operate motor vehicles will not be dismissed merely because the applicant has operated over a part of the route without a certificate. Re Tripp (Colo.) Application No. 501, Decision No. 987, May 13, 1926.

In Re Vinyard, Application No. 929, Decision No. 1406, Aug. 18, 1927, the Colorado Commission found that the applicant had been illegally operating for some time before the hearing in opposition to Rule 3 of the Rules and Regulations Governing Motor Vehicle Carriers. The Commissioners said: "Moreover the files of the Commission in this case show that on June 1, 1927, the secretary of the Commission wrote the applicant a letter, which was never returned, advising him, '. . . unless you desist from this unlawful operation . . . the Commission will have to take such proper steps as it deems necessary to eliminate your operation.' The duty of enforcing this rule is not a pleasant one for the Commission, but in order to have regulated, reliable operations in the state it is quite necessary that the rule be enforced, as is being uniformly done."

A certificate to operate a telephone system may not be denied because operation has been without one where there was no intent to disregard the law. Re Winn (Mo.) Case No. 4798, July 29, 1926.

V. Evidence of necessity.

In Re Ayres-Whiteside Transp. Co. Decision No. 18551, Application No. 13430, June 27, 1927, the California Commission refused a certificate of convenience and necessity to an applicant water transportation company, saying: "The preponderance of evidence submitted in this proceeding shows that Pittsburg and Antioch now have transportation facilities more than adequate to serve the present day requirements. Under the provisions of paragraph (d), § 50 of the Public Utilities Act the burden is upon applicant to establish the fact that the proposed service would be in the public interest; it failed to sustain this burden."

The California Commission, in dismissing applications for au-

thority to operate motor vehicle routes because the applicants would not be in a position to sustain an expected loss while developing patronage, said: "The Commission has heretofore held that public necessity for the operation of auto stage lines must be determined by the needs of the public at large, and that it can not be predicated on an applicant's belief that business may be developed. (Re Motor Transit Co. 21 Cal. R. C. R. 509; Re De Luxe Stage Co. 21 Cal. R. C. R. 76.) . . . The record shows a public convenience and necessity to be served by the granting of the authority sought by both applicants. Such public convenience and necessity, however, is not sufficient in extent to enable either applicant to meet the necessary operating expenses required in the performance of the service and there is no evidence justifying the conclusion that the revenue to be secured will meet such operating costs within an extended period. Neither applicant being in a financial condition, as regards net revenue sufficient to justify the assumption of unknown deficits which would follow the establishment of the proposed development or pioneering service, the deficits would require to be absorbed by the revenue now received from patrons of existing authorized lines." Re Key System Transit Co. Decision No. 18291, Application Nos. 12568, 13178, April 29, 1927.

In Re Vaughn, Application No. 761, Decision No. 1390, July 30, 1927, the Colorado Commission being of the opinion that the existing trucking utility, namely, the Camel Truck Line, was furnishing sufficient trucking transportation for the vicinity, refused to grant the certificate for regular schedule. The Commission pointed out, however, that its findings were not indicative of the fact that the demand for general irregular trucking in and around Rocky Ford might not warrant granting a certificate on those terms if the applicant so desired, and the action at this hearing was without prejudice to a further application for a certificate for irregular work. A similar disposition was made of the application of Ed D. Harriss operating in neighboring territory under the same circumstances. Re Harriss, Application No. 691, Decision No. 1392, Aug. 2, 1927.

In determining whether public convenience and necessity requires the operation of a motor passenger line, consideration should be given to the increase in population which may reasonably be expected in the territory in the near future. Re Chicago Motor Coach Co. (Ill.) No. 6066, Nov. 9, 1926.

To justify the issuing of a certificate of convenience and necessity for the operation of a motor bus line over state highways, it must be made to appear by the preponderance of all the competent evidence produced before the Public Utilities Commission that not only should such certificate be granted as a matter of convenience for public travel, but also that there is a necessity therefor; and this

court will not substitute its own judgment for that of the Commission unless an order based thereon is against the manifest weight of the evidence. Lykins v. Public Utilities Commission, No. 19790, 115 Ohio St. 376, 154 N. E. 249, Nov. 16, 1926.

Group and party service by taxis was authorized with limitations where it appeared that the company had been furnishing that service by busses for five years and that no certificate holder furnishing scheduled service had received or applied for the privilege. Re Daniels Taxi & Transfer Co. (Pa.) Application Docket No. 6813–1925, May 25, 1926.

The necessity of group and party service by taxis must be established by clear, convincing, and affirmative evidence. Ibid.

In Re Craig, Order Nos. 1400–A, 1447–A, Aug. 31, 1927, the South Dakota Commission, in commenting upon its approval of a motor trucking utility over territory served by an existing railroad, said: "After careful consideration of the entire record, the Board is of the opinion that the service proposed to be performed by the applicant St. Marie is in a large sense of considerable benefit to the people of the locality to be served; that the creating of this new market has given and will continue to give an important additional outlet for the products of the Belle Fourche and Spearfish valleys; that it has made possible the purchasing of these commodities by consumers residing along the Newell-Nettinger line operated by this applicant in a manner not heretofore possible; that to this extent public convenience and necessity have been shown."

In Re Trowbridge, Application D–48, Order No. 2099, June 29, 1927, the Washington Commission, granting a certificate of convenience and necessity for the operation of a motor freight service, said: "During the progress of the hearing in this matter, the applicant filed, over the objections of the protestants as to materiality, a series of petitions and letters requesting the granting of the certificate applied for. A number of witnesses who had signed such petitions or written such letters testified at the hearing. The petitions and letters introduced were considered by the Department only in so far as they were substantiated by the testimony of the witnesses."

VI. Scope.

In Auto Transit Co. v. Pickwick Stages, Northern Division, Inc. Decision No. 18508, Case No. 2103, June 14, 1927, the California Commission found that the defendant bus utility, had established local service between points unauthorized in its original certificate by the filing of a number of tariffs covering such transportation. The Commission stated that such operation was illegal and not affected by the formality of filed tariffs and ordered the service discontinued and the tariffs immediately cancelled.

In Re Colorado Utilities Corp. (Colo.) Application No. 826, Decision No. 1209, April 1, 1927, an electric company was requested to serve localities which were not being served by other utilities. The Commission said: "The applicant, under these circumstances, offers to serve the general public with electric current and energy in the various territories involved aside from the towns already served by it as soon as the requirements are sufficient to warrant the expense. The Commission feels, under these circumstances, that in that territory in which the applicant does not now operate it should have a prior right for a certain period to offer its service. The Commission feels that a reasonable period will be three years from the date of this certificate."

In Re Corson, Application Docket No. 16292, July 25, 1927, the Pennsylvania Commission, in passing upon an application for authority to operate motor vehicles as a common carrier, said: "It is the general rule of the Commission to limit group or party bus service to fifty miles from the point of origin. Experience has shown this policy to be salutary, and no compelling reason is seen in the instant case to lead the Commission to depart from it. To do so here would invite a departure elsewhere, for a privilege given to one class would necessarily soon be extended to all. The Commission cannot look with favor upon a 'roving certificate' under which a bus in group or party service could roam at large throughout the state."

A certificate to operate motor vehicles between a city and a hotel through named villages, and thence from the hotel to another city through named villages, includes the right to furnish service to the villages. Lehigh Traction Co. v. Collins (Pa.) Complaint Docket No. 6078, June 8, 1926.

VII. Assignment, transfer, and sale.

In Re Overall (Cal.) Decision No. 18550, Application No. 13576, Case No. 2342, June 27, 1927, the complainant averred that an alleged partnership between the two defendants and their purported operation under the fictitious name given did not exist, and if such relationship had ever been created, it had been dissolved in 1920 by mutual consent. The complainant asked, in effect, that the Commission find that the certificates previously granted had never vested, or if they did vest,—had become forfeited by an alleged dissolution of the partnership and that, therefore, there were no certificates in legal existence for a transfer to a corporation which was also asked by the defendants in this cause. After pointing out a fatal defect in the attempted dissolution referred to, Commissioner Louttit says: "In my opinion the record shows that Orval Overall and E. L. Askin did enter into a partnership and that such partnership was never dissolved. This Commission has never authorized Orval Overall to

transfer any of his interest in the certificates which the Commission has heretofore granted to him and E. L. Askin as partners and to which reference will be made herein. It seems to me that Orval Overall is responsible as a partner in such degree and to such extent as would be necessary to make it possible for the Commission to require him to perform the service undertaken by the partnership. I believe that the complaint filed by the Sequoia and General Grant Parks Company should be dismissed."

In Re Raisor, No. 556–M, Aug. 13, 1927, the Indiana Commission approved a sale of motor transportation equipment of the petitioner and his certificate of public convenience, allowing the sum of $1 as the sale price of the latter.

The joint ownership of certificates authorizing motor vehicle service over two lines is a desirable and proper method of authorizing the joint service. Re Spencer-Martinsville Motor Line (Ind.) Nos. 185–M, 549–M, Oct. 25, 1926.

On hearing of application to transfer certificate of convenience and necessity of motor transportation company after publication of notice thereof, questions of abandonment by original certificate holder or furnishing of adequate service by it were not germane. Ramsey v. Public Utilities Commission, No. 19757, 115 Ohio St. 394, 154 N. E. 730, Dec. 7, 1926.

On application to transfer certificate of convenience and necessity of motor transportation company, all matters relevant must be presented at original hearing. Ibid.

VIII. Revocation.

A certificate to construct and operate water power for the generation of electricity, including authority to exercise the power of eminent domain, will not be renewed, and will be cancelled, except as the rights of bona fide owners of authorized securities may be affected, where the rights have not been exercised within a statutory period of two years from the grant. Re Illinois Light & P. Co. (Ill.) Supplemental Petition No. 3479, Oct. 7, 1926.

Where it appears that the Public Utilities Commission was not deceived as to the persons to whom were issued certificates of necessity and convenience, and the persons receiving such certificates were lawfully entitled thereto under the facts actually existing, an order refusing to revoke such certificates upon complaint of a rival transportation company, where the service is efficient and the rights of the public are not concerned, and no fraud has intervened, is neither unreasonable nor unlawful. Southern Ohio Pub. Service Co. v. Public Utilities Commission, No. 19800, — Ohio St. —, 154 N. E. 365, Dec. 7, 1926.

OREGON PUBLIC SERVICE COMMISSION.

RE IDAHO POWER COMPANY.

[P. S. C. Or. Order No. 1518, U–F–413.]

Interstate Commerce — Distribution of power generated in another state — Jurisdiction.

Current generated in a foreign state by a power utility whose only local equipment is of a stand-by character and delivered direct to the transmission lines of a distributing company is interstate commerce, and the State Commission has no jurisdiction to entertain proceedings regarding its regulations as to rates and service.

[September 30, 1927.]

INVESTIGATION on the motion of the Commission into the rates and other practices of a power company; dismissed for lack of jurisdiction.

By the **Commission:** Under the date of July 25, 1927, the Idaho Power Company filed a supplemental application with this Commission for a revision of its schedules of rates for electric service in the state of Oregon and requested that certain schedules designated No. 6-C, water heating and auxiliary air heating, and Schedule 8-A, irrigation pumping-limited service, filed with the Commission July 27, 1927 effective October 1, 1927 be substituted in lieu of schedules now on file in this office covering said service and further requested that Schedule 4–F, power for continued transmission, distribution, and resale to other public utilities, be not extended or renewed, but the further use thereof be discontinued.

Pursuant to statutory notice the above entitled matter came on for hearing at the City Hall, Ontario, Oregon, on August 19, 1927 at the hour of 2 o'clock P. M.

Appearances: Hon. John F. MacLane, Attorney, W. R. Putnam, General Manager and Vice President, James L. Boone, Attorney, for Idaho Power Company; H. R. Waldo, Attorney, H. B. Waters, General Manager, for Vale Power Company; J. M. Lampert, Attorney, for Oregon power users; R. W. Swagler, Attorney, for Payette-Oregon Slope Irrigation District; J. W. Galloway, Attorney, for Snake River District Improve-

ment Company; Bruce R. Kester, Attorney of Ontario filed appearance in behalf of Ontario-Nyssa Irrigation Company, Kingman Colony Irrigation Company, Owyhee Ditch Company, Payette-Oregon Slope Irrigation District, Ashcraft & Smith, city of Ontario and Short Line Ditch Company.

Testimony was fully submitted as to Schedule No. 6-C, water heating and auxiliary air heating, and as to the reasonableness or unreasonableness of Schedule 4-F, power for continued transmission, distribution, and resale to other public utilities. It was stipulated at the hearing that further hearing would be had concerning Schedule 8-A, irrigation pumping-limited service, and for that reason said schedule will not be considered in this order.

It appears from the records that the rates prescribed in Schedule 6-C, water heating and auxiliary air heating, are not unjust, unreasonable, or unjustly discriminatory and that said schedule should be permitted to become effective as of October 1, 1927.

The only matter in issue at this time would seem to be Schedule 4-F and, therefore, we will confine our remarks to that particular schedule.

In its Order No. 1086 (P.U.R.1924E, 399) this Commission prescribed a schedule of rates designated 4-F, power for continued transmission, distribution, and resale to other public utilities, on a basis of 35 per cent of the regular power rate. Such rate was experimental, temporary in nature, and was only placed in effect for a period of one year. However, such rate has been continued in effect from time to time by order of the Commission upon stipulation of the parties in interest and did not expire until July 30, 1927.

The testimony of both the Idaho Power Company and the Vale Electric Company was confined to valuation matters and the reasonableness or unreasonableness of Schedule 4-F. We believe, however, that it is one of the fundamental principals of law that jurisdiction must be first established before a tribunal can pass on the merits of a particular matter.

It will be conceded, we think, that the Idaho Power Company is engaged primarily in the generation, transmission, and

distribution of electric energy in interstate commerce to be sold at retail to local consumers in Oregon and at wholesale to the Vale Electric Company which in turn sells and delivers it to retail consumers.

In the case of Public Utilities Commission v. Attleboro Steam & Electric Company, the United States Supreme Court held that sale of electric energy generated in one state and transmitted in interstate commerce to another state for sale and delivery wholesale direct to a distributing company for redistribution and resale, is a transaction that is essentially national and not local in character and state regulation of such service would impose a direct burden on interstate commerce in contravention of the commerce clause of the Federal Constitution. Public Utilities Commission v. Attleboro Steam & Electric Co. — U. S. —, 71 L. ed. —, P.U.R.1927B, 348, 47 Sup. Ct. Rep. 294; Peoples Nat. Gas Co. v. Pennsylvania Pub. Service Commission, 270 U. S. 550, 70 L. ed. 726, P.U.R.1926D, 187, 46 Sup. Ct. Rep. 371.

It is our understanding that the electric energy transmitted to the Vale Electric Company is generated in Idaho by the Idaho Power Company and delivered direct to the transmission lines of the Vale Company in Oregon. The Idaho Power Company, it is true, has a stand-by plant at Oxbow, Oregon, but its generating capacity is limited and in certain seasons of the year it cannot be operated at all. At the best it is only a secondary unit for use in emergency.

Therefore, it is our opinion that under the recent decisions of the United States Supreme Court handed down subsequent to the entry of our previous order the character of the interstate service rendered to the Vale Electric Company by the Idaho Power Company has been held to be primarily "National" and that the regulation thereof would be without the jurisdiction of this Commission. We believe this matter should be dismissed.

P.U.R.1928A.

UTAH PUBLIC UTILITIES COMMISSION.

RE BAMBERGER ELECTRIC RAILROAD COMPANY.

[Case No. 944.]

Monopoly and competition — Pick-up-and-delivery by electric railway — Existing motor truck service.

The inauguration of a pick-up-and-delivery service by an electric railway should not be disapproved because such service is being rendered by a motor transportation utility.

[September 13, 1927.]

APPLICATION of railroad company for permission to operate a pick-up-and-delivery service; approved.

Appearances: Irvine, Skeen & Thurman, Attorneys, of Salt Lake City, for applicant; Wilson McCarthy, Attorney, of Salt Lake City, for protestant, Salt Lake-Ogden Transportation Company.

By the **Commission**: This matter came on regularly for hearing, before the Public Utilities Commission of Utah, at its office in Salt Lake City, Utah, on the application of the Bamberger Electric Railroad Company, a corporation, for an order of the Commission permitting it to accord to its shippers a pick-up-and-delivery service at its terminals in Salt Lake City and Ogden, Utah, and the protest filed thereto by the Salt Lake-Ogden Transportation Company.

From the admitted facts shown by the records and files in the case, and from the evidence adduced for and in behalf of the respective parties, it appears:

1. That the Bamberger Electric Railroad Company is a corporation, organized and existing under the laws of the state of Utah, with its principal office and place of business in Salt Lake City, Utah, and as such corporation it is authorized to and for more than thirty years last past has operated a railroad, carrying persons and property, for hire, between Salt Lake City and Ogden and intermediate points; that as such common carrier it is and has been a "public utility" and "railroad corporation" within the meaning and subject to the provisions of Title 91,

Compiled Laws of Utah, 1917, commonly known as the Public Utilities Act, and the laws of this state amendatory thereto.

2. That the protestant, Salt Lake-Ogden Transportation Company, is an "automobile corporation" under the laws of the state of Utah, with its principal office or place of business at Salt Lake City, Utah, and that as such corporation it is authorized to and is now conducting a transportation business, transporting property for hire over the public highway between Salt Lake City and Ogden, Utah, and intermediate points, under certificate of convenience and necessity No. 103 (Case No. 486) (P.U.R.1922C, 170) issued, March 14, 1922, by the Public Utilities Commission.

3. That the applicant, Bamberger Electric Railroad Company, proposes herein, if permission is so granted by the Commission, to afford to shippers over its railroad line a pick-up-and-delivery service at its terminals, Salt Lake City and Ogden.

4. That the protestant, Salt Lake-Ogden Transportation Company, is now and has for several years last past been giving a pick-up-and-delivery service between Salt Lake City and Ogden and intermediate points.

5. That jobbers, wholesale merchants, and various shippers of freight and express, between Ogden and Salt Lake City, to the number of thirteen, have represented to the Commission that a pick-up-and-delivery service, if accorded by the Bamberger Electric Railroad, would be a great convenience to them and to the shipping public in general; that others, to the number of four, have represented to the Commission that the pick-up-and-delivery service now being rendered by the protestant, Salt Lake-Ogden Transportation Company, between Salt Lake City and Ogden and intermediate points, is dependable and satisfactory.

6. That Salt Lake City and Ogden are the two largest cities in the state of Utah, and, while there are a number of intermediate points, the freight and express traffic afforded by them as compared with Salt Lake City and Ogden is small.

It is contended by the protestant that by reason of its now rendering efficient and dependable pick-up-and-delivery service at all points served by its automobile route, and for the further reason that it is first in time under the orders of the Commission

to afford such service, the same right or privilege should not now be accorded to the petitioner as a railroad operator; and further, that the granting of similar rights to those the protestant now enjoys would create a competitive situation that would not enure to the benefit of the public.

While it is true that the pick-up-and-delivery service rendered by the protestant to shippers patronizing its route is shown to be satisfactory to the public, the Commission takes the view that if shippers by rail desire a similar service at the hands of the petitioner, no good or valid reason can be assigned under the facts shown by the record in this case why the Commission should not grant it permission to do so. Why, may we ask, should any common carrier be limited in the manner of making its service as convenient and as desirable as conditions will reasonably permit? It may be, as claimed, that the rendering of a pick-up-and-delivery service as proposed by the petitioner will deprive the protestant of some traffic that it is now receiving. Nevertheless, where competitive conditions are shown to exist, shippers have a right to choose such facilities as are afforded them and determine for themselves as to who may best serve their interests. Then too, there is a wide distinction, we think, from the standpoint of public convenience and necessity, between the right to operate an established line or route and the granting of a right to accord more convenient and better service by a utility that is already required to operate under competitive conditions.

It might be that the building of a warehouse or spur track by the petitioner for the convenience of the shipping public would result in the taking away of some traffic that the protestant now enjoys. It might be that the operation of more trains or some new type of car affording more convenient ways of loading and unloading freight would prove attractive to certain shippers by rail, and the providing of same by petitioner would result in taking from protestant some traffic that it might otherwise enjoy. Nevertheless, the right of petitioner to accord improved service or conveniences for the accommodation of shippers must be regarded in the interest of the public, and as paramount to any right of the protestant to maintain a monopoly in that regard.

We can but conclude that the right of the Bamberger Electric Railroad Company to accord to its patrons a pick-up-and-delivery service as applied for should, in the interest of the public, be granted, subject to discontinuance, however, only upon a proper showing made to the Commission that public interest does no longer require the same.

WASHINGTON DEPARTMENT OF PUBLIC WORKS.

RE COLUMBIA GORGE MOTOR COACH SYSTEM.

[R-9134, Order No. 2087.]

Certificates of convenience and necessity — Evidence — Interstate demand.

1. Evidence covering an interstate demand for motor bus service cannot be considered where permission is asked to give intrastate service, p. 121.

Monopoly and competition — Railroad and motor bus service.

2. Authority to operate an intrastate motor bus service should be denied when the train service along the proposed route is sufficient, p. 121.

[June 9, 1927.]

APPLICATION for certificates authorizing motor bus service, both interstate and intrastate; certificate for interstate operation granted and certificate for intrastate operation denied.

By the Department: This matter came on regularly for hearing at Stevenson, Washington on the 19th day of May, 1927, pursuant to notice duly given, before R. E. Ostrander, examiner, the Department being represented by E. A. Philbrick, Attorney, E. J. Delbridge reporting the proceedings.

The parties were represented as follows:

Hance H. Cleland of Cleland & Clifford, Attorneys, Olympia, for Columbia Gorge Motor Coach System, applicant; M. K. Holland, Attorney, Portland, for Spokane, Portland & Seattle Railway, protestants.

Witnesses were sworn and examined, documentary evidence was introduced and the Department, being fully advised in the

premises, makes and enters the following findings of fact and order:

Findings of Fact

I.

The Columbia Gorge Motor Coach System is the owner of certificate of public convenience and necessity No. 455 authorizing passenger and express service by means of motor propelled vehicles between various points in the state of Washington and the state of Oregon and intrastate service between Vancouver, Washington, and Washougal, Washington. Such company is also authorized to render a like service between various points in the state of Oregon, particularly between the cities of Portland and Pendelton via the Columbia River highway and between the Dallas and Bend, Oregon.

II.

On the 7th day of March, 1927, the Columbia Gorge Motor Coach System filed its application with this Department asking for a certificate of public convenience and necessity authorizing passenger service between Cascade Locks, Oregon, and Stevenson, Washington, via the Bridge of the Gods and the North Bank highway and extended from Stevenson, Washington to White Salmon, Washington with the privilege of rendering an intrastate service in Washington between White Salmon and other points between there and the Bridge of the Gods.

III.

The Spokane, Portland & Seattle Railway Company operates two local trains per day each way and one through train which will stop on flag and one through train which will take on passengers only when required to stop to discharge other passengers at the points involved in this application.

IV.

The evidence introduced at the hearing further shows that the local ticket sales of the railway company for the various points involved herein amount to four or five tickets per day; that in

addition thereto there are some cash sales by the conductors on the trains, but the number of such are unknown. It further shows that the train service has not been diminished or schedules disturbed for some time.

The bulk of the testimony introduced at this hearing indicates that the purely local or intrastate travel is extremely light. The principal points to be served are White Salmon, Stevenson, Carson, and St. Martins, the latter two being mineral spring health resorts. Applicant introduced testimony showing the large patronage accorded these health resorts but the testimony further showed that all, or practically all such patronage and the patronage of the Government Springs Hotel would consist of interstate business.

Stevenson is the county seat of Skamania county and the desire for intrastate business would be to accommodate residents of the county who occasionally wish to visit or transact business in the county seat. The entire population of the county was shown to be approximately two thousand three hundred. White Salmon is in an adjoining county.

The testimony introduced in behalf of the health resorts was directed almost in its entirety to the inconvenience of the guests to get the trains leaving for points outside the state.

Point was also made of the connections to be made with the stages operated by Mr. Wyers at White Salmon. Mr. Wyers' testimony was to the effect that the service offered by applicants would be very convenient for those of his passengers desiring to go down the river to Portland. His patronage amounts to only four or five passengers per day and such as travelled on the stages of the applicant, probably would be interstate.

[1, 2] It would appear from the evidence that the train service now being furnished the communities along the route for which application is made is sufficient. It is recognized that such may not suit the convenience of some of the travellers between some of the towns. Cases of this nature must be determined upon the facts that can be drawn from the evidence introduced, and evidence covering an interstate demand for service can not be considered where permission is asked to give intrastate service.

While evidence of convenience may be a factor in determining the necessity for service it is not a controlling factor, and the Department must recognize the needs and requirements of the section sought to be served.

From the standpoint of intrastate demands it is apparent that the present service is sufficient to answer the convenient and necessary demands of the community and that there is no sufficient evidence to authorize the granting of a certificate for intrastate service over the route as outlined in the application.

WASHINGTON DEPARTMENT OF PUBLIC WORKS.

DEPARTMENT OF PUBLIC WORKS OF WASHINGTON EX REL. PATRONS

v.

WASHINGTON WATER POWER COMPANY.

[No. 6056.]

Return — Electric utility — General rate structure — Air heating.

1. A general rate structure yielding approximately 7 per cent on the investment of an electric utility was held to be sound notwithstanding a proven inadequacy in particular rates for air heating, p. 126.

Rates — Electric — Air heating — Cost of equipment.

2. A proposed increase of rates for electric air heating was held likely to result in loss of a certain class of customers, causing a loss by discontinued service to such consumers as had invested in electric heating equipment as well as added cost of installing different heating apparatus, p. 127.

Rates — Electric — Air heating — Cost of equipment — Solicitation.

3. A proposed increase of rates for air heating by an electric utility was rejected and a more moderate increase ordered where it appeared that although the current rates were noncompensatory and discriminatory such patrons were originally solicited by the utility and had installed equipment for such service at considerable expense and, therefore, the loss should be distributed equitably between the utility and consumers, p. 128.

[October 8, 1927.]

APPLICATION for increase of air-heating rates; increase modified.

P.U.R.1928A.

By the **Department:** This matter came on regularly for hearing at Pateros, Washington, on the 15th day of September, 1927, pursuant to notice duly given before C. Rea Moore, supervisor of public utilities, the Department being represented by R. E. Ostrander, Legal Assistant, and F. Harper Craddock, Assistant Chief Engineer; E. J. Delbridge reporting the proceedings.

The parties were represented as follows:

Charles T. Borg, Attorney, Pateros, for complainants; B. O. Graham, Attorney, Tonasket, for customers of Tonasket; H. B. Davis, its Attorney, Spokane, for the Washington Water Power Company.

Witnesses were sworn and examined and documentary evidence was introduced.

Discussion

About 1917 or 1918, the four electrical utilities operating in the Okanogan Valley were merged by the Okanogan Valley Power Company, which was controlled and managed by Mr. Eugene Enloe. The present Oroville power plant was constructed and a transmission line was built to connect the towns in the Okanogan Valley. It appears that the principal load other than lighting was the summer irrigation load. Mr. Enloe conceived the idea of building up an electric air heating load to offset the summer irrigation load. Most of the present heating load was installed during 1920, 1921, and 1922.

On January 1, 1923, the Washington Water Power Company purchased and began operating the property of the Okanogan Valley Power Company. The Washington Water Power Company adopted the rates of the Okanogan Valley Power Company, and continued to use them until February 20, 1926, when Tariff No. 7, W. D. P. W. No. 7, became effective. This tariff provided for a reduction in some of the rates and embodied the old Schedule M, air heating, as new Schedule No. 81. The air heating rate remained the same but the service was limited by the tariff, as follows:

"This rate applies to customers in the Okanogan Valley only,

who are at present equipped with facilities for air heating and are now connected to the company service."

The Washington Water Power Company not only has declined to take on additional air heating load, but since it purchased the facilities of the Okanogan Valley Power Company, it has reduced the air heating load nearly 50 per cent.

On May 17, 1927, the Washington Water Power Company issued its first revision of Sheet No. 14 of Tariff No. 7 to become effective as of June 30, 1927. The first revision of Sheet No. 14 provides for the withdrawal of Schedule No. 81, air heating, and places all customers affected thereby under Schedule No. 77, general power rate.

The Department being fully advised in the premises makes and enters the following findings of fact and order:

Findings of Fact

I.

That the Washington Water Power Company is a corporation with its principal place of business in Spokane, Washington; that it owns, operates, and maintains an electric system for hire in Okanogan Valley, as well as in other places in the state of Washington; and is a public utility subject to the jurisdiction of the Department of Public Works of Washington.

II.

That the agents of the Okanogan Valley Power Company solicited some of the present air heating customers to take air heating service and in some instances sold air heating equipment to such customers.

III.

That the electrical facilities of the Okanogan Valley Power Company were purchased by the Washington Water Power Company on January 1, 1923, at which time it obtained a number of customers who were being supplied with electric service for air heating; that the respondent adopted the rates of the Okanogan Valley Power Company and continued to use them until February 20, 1926, when its Tariff No. 7, W. D. P. W. No. 7,

became effective. The old air heating rates were embodied in Tariff No. 7, as Schedule No. 81, but the service was limited to customers in the Okanogan Valley who at that time were equipped with facilities for air heating, and who were, at that time, connected to the electric service of the respondent. The respondent has reduced the air heating load under Schedule No. 81 from 278.5 kilowatts to 143.2 kilowatts, since it purchased the facilities of the Okanogan Valley Power Company.

IV.

That the maximum demand placed upon the entire electric system of the respondent company occurs in the winter months, usually in December or January, but the maximum energy generated and purchased usually occurs during July and August. The respondent is dependent upon stored water in Lake Coeur d'Alene for the generation of its energy and it has no steam power plants available. At the time the utility is producing its maximum amount of energy it is drawing upon its stored water supply which reaches its minimum during the heating season. The Chelan power plant is now being constructed at a considerable expenditure to remedy this situation.

V.

That the present load in the Okanogan Valley is approximately 8,000 kilowatts in the summer and approximately 2,500 kilowatts in the winter.

The capacity of the Oroville plant is 3,200 kilowatts when sufficient water is available. During August, 1926, the Oroville plant did not operate part of the time and the load carried during the remainder of the time varied from 300 to approximately 1500 kilowatts owing to the shortage of water. On December 13, 1926, the load on the Oroville plant was dropped to zero owing to the fact that the river was frozen and no water was available by which power might be generated. This condition continued until nearly the first of February with the plant either not operating or operating with only a small load. If the heating customers in the Okanogan Valley had been entirely dependent upon the Oroville plant, sufficient electrical

energy would not have been available during the extreme cold weather of December, 1926, to supply the heating load which would have been imposed upon the system.

VI.

That there are now about seventy-nine customers who may be expected to take heating service during the coming winter if such service is available under present Schedule No. 81. The total heating load is 143.2 kilowatts or at the average rate of 1.8 kilowatt per customer. To comfortably heat the average five or six room house during the winter months would require in excess of ten kilowatts. It is, therefore, apparent that the majority of the customers now obtaining heating service are not using this service as the main source of heat but merely as an auxiliary source. There are, however, a few places which are dependent to a greater extent upon electrical energy as a source of heat.

VII.

[1] According to the figures submitted by the respondent company in its 1926 annual report to the Department, the percentage earned on the average plant value, exclusive of working capital, was 7.16, without considering the investment in the Chelan power plant.

VIII.

That since the present rate structure, according to figures submitted in the respondent's annual report, yields approximately 7 per cent on the investment of the utility, it may be assumed that the general rate structure of the utility is reasonable.

IX.

That Schedule No. 81, air heating, provides for a flat rate of $18 per kilowatt for the six months' heating season, which is at the rate of $3 per kilowatt per month. For continuous use during the month, the cost per kilowatt hour will be approximately $0.0041. A comparison of the rate set forth under present Schedule 81, with the other rates of Tariff No. 7, indi-

cates that the cost of service under Schedule 81 is much lower than under the other rate schedules. Schedule 81 is a flat rate service and is subject to abuse.

X.

That Schedule No. 77, general power rate, is a meter schedule made up of demand and energy charges. Under this schedule, for continuous use for an average month, the cost per kilowatt is approximately $8.78, making the cost per kilowatt hour approximately $0.0121. If air heating is placed under Schedule No. 77, the cost of the service compares very favorably with the cost of other types of service under the other rate schedules.

XI.

Exclusive of the customers obtaining service under Schedule 81, as enumerated above, air heating service when rendered under Tariff No. 7, is placed under Schedule 70, residential lighting and cooking; Schedule 73, commercial lighting and incidental motors; or Schedule 77, general power, depending primarily upon the classification of the customers in so far as the other uses of electrical energy are concerned.

XII.

[2] That if Schedule 81 is withdrawn and air heating service placed under Schedule 77, many of the customers, especially those having a demand greater than one kilowatt, will discontinue the service. Customers discontinuing such service will suffer a loss due to the fact that they will abandon their electrical air heating equipment and find it necessary to install some other type of equipment for heating purposes. These losses will vary considerably between customers and will depend primarily upon the difference between the amount realized by the sale of the equipment and the actual value of the equipment at the time it is abandoned, as well as the additional expense that may be incurred in installing other types of heating equipment after the houses were built over the cost of installation at the time the houses were built. Practically all of the customers have had at least five years or more use of their equipment which will

reduce the present value considerably below the original cost of the equipment.

XIII.

[3] That the respondent company is now, and has been for several years past supplying electrical energy for air-heating purposes under Schedule 81, at rates which are noncompensatory, and discriminatory. However, many of the patrons were solicited by agents of the Okanogan Valley Power Company to take electric service for air heating under the rate now appearing in Schedule 81. Many will be forced to discontinue service and abandon their air heating equipment if the service is placed under Schedule 77. It is desirable that the losses be distributed equitably between the respondent and the customers. Therefore, first revision of Sheet No. 14, withdrawing Schedule No. 81, and providing for air-heating service under Schedule 77, for the customers affected, is found to be unjust, unfair, and unreasonable, in so far as its effective date is concerned. The first revision of Sheet No. 14 is, therefore, rejected, and in lieu thereof the utility should file second revision of Sheet No. 14, cancelling original Sheet No. 14, and containing the provisions set forth below:

Schedule 81

Air Heating

(Flat Rate Service)

Schedule 81 will be cancelled on April 1, 1929, in accordance with Order No. 6056, of the Department of Public Works of Washington. Subsequent to April 1, 1929, service heretofore offered under this schedule will be handled under Schedule 77.

Schedule 81 is cancelled for the reasons that it is discriminatory and noncompensatory.

Second revision of Sheet No. 14, shall be issued within thirty days from the date of this order, and shall be made effective upon the same date that it is issued.

WISCONSIN RAILROAD COMMISSION.

RE BERGEN TELEPHONE COMPANY.

[T-1270.]

Monopoly and competition — Telephone extensions — Factors considered.

A telephone company may be permitted to extend service to a new residence of a subscriber to whom it rendered service at his former residence on the same farm, which has since been divided, although it appears that a line from another company is nearer, if his family, business, church and social connections are almost exclusively in the territory served by the first company, even though the nearest railroad station, his bank, and the place of transaction of some other business is in the territory of the second company.

[May 21, 1927.]

APPLICATION for authority to extend telephone service; application granted.

By the **Commission**: On May 3, 1927, the Bergen Telephone Company filed with the Commission a notice of extension to serve the residence of C. A. Larson in the town of Clinton, Rock county. Objection having been filed by the Clinton Telephone Company, a hearing was held at Madison on May 18, 1927, at which H. S. Anderson appeared for the Bergen Telephone Company, F. W. McKinney, for the Clinton Telephone Company, and C. A. Larson on his own behalf. The testimony shows that Mr. Larson now resides at a point on County Trunk Highway P. in the northeast quarter of the northwest quarter of section 30, town of Clinton. There is no telephone line on the road in front of his premises, but a line of the Clinton Telephone Company extends on County Trunk P. from the east line of section 19 and serves two residences between that corner and Mr. Larson's place. The distance from the east line of section 19 to Mr. Larson's place is about three-fourths of a mile, and the terminus of the Clinton Telephone Company's line is about one-fourth of a mile from his premises.

The line of the Bergen Telephone Company extends on County Trunk P. from the east to the east line of section 19, turning south at that point on a town road and terminating at the former

residence of Mr. Larson about three-fourths of a mile south of the corner. The farm on which Mr. Larson formerly lived was divided between him and a brother and he has constructed a residence at his present location, the former home being occupied by a tenant of his brother. All of his relatives in this general locality are served by the Bergen Telephone Company. He exchanges work with farmers served by the Bergen Company, and is connected in a threshing company with farmers served by that company. His church and social connections are almost exclusively in the territory served by the Bergen Company.

On the other hand his nearest railroad station is Clinton. His banking and some other business is transacted at Clinton, and he goes to Clinton for medical and veterinarian service.

The rural rate of the Bergen Telephone Company is $1.25 per month; that of the Clinton Company $1.75 per month. There is a toll charge of 5 cents per message on communications between the two exchanges.

Reference was made at the hearing to the decision of the Commission in 1913 with respect to the proposed extension of the Clinton Telephone Company to serve Mr. Charles Doering (13 Wis. R. C. R. 166). In that case, the line of the Bergen Telephone Company was on the road in front of Mr. Doering's house and extended beyond there to serve several customers. At that time the toll rate between the exchanges was 2 cents per message, instead of 5 as at present. Moreover, it appeared that Mr. Doering had moved from north of Clinton to the location in question and that the neighbors with whom he was thrown at the new location were principally served by the Bergen Company. The facts in that case appear to be sufficiently differentiated from those in the present case to warrant a somewhat different treatment.

Mr. Larson is still occupying the same farm upon which his former residence was located, and the change will have no material effect upon his relationships in the community. The situation is quite different from what would have existed should he have moved a considerable distance from his former location so that a new alignment of neighborhood relationships would have been inevitable. While the proposed extension will involve some

duplication of line, it does not appear that any real hardship will be worked upon the Clinton Telephone Company, inasmuch as it was stated by the superintendent of that company that the two customers served on the route where the duplication would be are not likely to wish to change to Bergen service, because of their existing relationships with Clinton.

Having in mind all of the facts as developed at the hearing, the Commission is unable to find that public convenience and necessity do not require the extension as proposed, and the Bergen Telephone Company is, therefore, authorized to proceed with the same.

WISCONSIN RAILROAD COMMISSION.

RE ST. CROIX VALLEY TELEPHONE COMPANY.

[U-3260.]

Rates — Physical connection contract — Commission interference — Telephones.

The Commission will not interfere with the terms of a contract between two connecting companies, providing for free interchange of messages, for the purpose of imposing a toll rate, unless the establishment of such toll rate is shown to be necessary in the interest of reasonably adequate service or to prevent or remove unjustifiable discrimination.

Rates — Powers of Commission — Change in contract.

Discussion of the power of a Commission to change the terms of a contract between two telephone companies relating to interchange of messages, p. 132.

[May 25, 1927.]

APPLICATION for authority to increase rates; on further hearing no further order made.

By the **Commission:** An order was entered in the above entitled matter on October 5, 1925, as follows:

"It is therefore *ordered* that the St. Croix Valley Telephone Exchange Company and the Milltown Mutual Telephone Company establish a penalty charge of 10 cents for each minute in excess of three minutes on all calls made by subscribers of either

exchange to subscribers of the other exchange over the clear line connecting the St. Croix Falls and Milltown exchanges. Each company shall retain the penalty charges on calls originating at its exchange.

"Jurisdiction is retained to enter such further order as may be warranted after a six months' trial period under this order."

The observation of the operation under this order, made by the Commission's engineering staff, developed facts which, in the opinion of the Commission, were sufficient to justify a further hearing with respect to the matter and such hearing was duly held on February 7, 1927, at St. Croix Falls. The St. Croix Valley Telephone Exchange was represented by Hon. W. L. Smith, and L. T. Olcott; and the Milltown Telephone Company by M. E. Yager.

The testimony shows that after considerable correspondence and discussion between the two companies and the Commission, the companies agreed to ticket all calls over the line in question between Milltown and St. Croix Falls and to apply the penalty charge on all calls in excess of three minutes and have so operated since March 1926. The St. Croix Company contends that this arrangement is burdensome, in that it imposes a large amount of clerical labor upon the operators without creating a revenue commensurate therewith. On the other hand, the Milltown Company appears to be entirely satisfied with the arrangement and sees no hardship therein. It was shown that the number of messages transmitted over the line in question has materially diminished since the penalty charge for conversations in excess of three minutes was imposed and it also appears evident that the length of the calls made has been materially decreased. These two factors naturally result in improving the service over the toll line.

As was pointed out in the original order herein, there is in existence a contract between the two companies providing for a division of territory and also establishing the terms and conditions of the operation of the physical connection between the two companies made as a result of that contract. This contract was entered into on June 30, 1911, and provides that it shall take effect on August 1, 1911, and continue in force for the term of

five years and thereafter until one year's written notice by either party of its desire to discontinue said service. It has not been shown that either party has given the one year's written notice of cancellation required in the contract, and it, therefore, is evident that this contract is still in force and effect. Section 196.04, relating to the physical connection of telephone companies, contemplates that this Commission should have jurisdiction over the terms and conditions of a physical connection as between the connecting companies only upon the failure of the two telephone companies involved to reach a mutually satisfactory agreement. This provision, however, does not deprive the Commission of jurisdiction to establish reasonable rates to the public or to require reasonably adequote service over such joint line, even though these matters may be touched upon in the contract. In other words, such a contract, in so far as it attempts to deprive the Commission of jurisdiction over rates and service to the public, is repugnant to the statutes and void. The division of revenue as between the two companies and the arrangement of other matters not directly related to service or rates are, however, governed by the agreement between the two companies, if such an agreement has been reached.

Where a contract between two connecting companies provides for the interchange of messages without toll charge as one of the conditions of a territorial division between the two exchanges, the Commission will not interfere with the terms of such contract during its life to impose a toll rate unless the establishment of such toll rate is shown by clear and indisputable evidence to be necessary in the interest of reasonably adequate service or to prevent or remove unjustifiable discrimination.

In the original application, the St. Croix Company asked for a toll rate, not to increase its revenue but for the purpose of improving the service. The Commission found that the service being rendered on the toll line was inadequate because of overcrowded conditions and the order was made with the view of correcting this condition. As indicated above, definite improvement in the service has been made. The line, however, is still somewhat overloaded and with any considerable increase in traffic the establishment of a toll charge applying to all messages

will become necessary to insure adequate service, in view of the fact that the construction of additional circuits between Milltown and St. Croix Falls would impose a financial burden not justified under the existing conditions. However, the Commission does not feel that the present service can be fairly regarded as inadequate.

The traffic data submitted (Exhibit 1) shows that for a four-month period out of 950 subscribers of the St. Croix exchange 115 subscribers made 77.7 per cent of all of the calls out of that exchange on the line in question. In other words, 835 subscribers or 88 per cent of the total used only 22.3 per cent of the service rendered, and each paid an amount for service equal to that paid by the subscribers making constant use of the line. In discussing a similar situation, the Commission has said:

"On the other hand, the elimination of the discrimination which unquestionably exists in these exchanges between parties using large amounts of intercity service and those using small amounts can be accomplished by placing in effect a standard system of handling the business which is effective in practically all other similar situations, and, it might be added, has been subject to very little complaint. Under these conditions we can hardly hold that the elimination of this discrimination will work a material hardship. Also it seems to us that without any question there is an unjust discrimination in this case, unjust because of the great quantities of service which some parties receive which are paid for by others, and unjust also because its continuance is unnecessary and the remedy for it lies in the adoption of a system of handling the business which is almost universally in effect." Re Wisconsin Teleph. Co. P.U.R.1926C, 546, 551.

In the present case, however, the interchange of messages without toll charge is of the essence of the contract and those against whom the discrimination exists have not objected thereto, but on the contrary have generally expressed their desire to retain the present service. The arrangement now in force was suggested by the Milltown Company at the original hearing as a means of improving the service without destroying the essentials of the contract.

Under all the circumstances of this case, the Commission is

of the opinion that, in view of the existence of the contract in question, the discrimination which exists is not unjust and that the service is reasonably adequate.

Should either company take the requisite steps to cancel the contract, a materially different situation would be presented. In the case above cited, the Commission held that telephone companies may as a matter of law establish toll rates between exchanges and that in such cases the Commission's function is to determine what is the reasonable rate for the interchange of messages.

In view of the conclusions stated above, no further order in the premises is necessary.

NEW JERSEY SUPREME COURT.

RAHWAY VALLEY RAILROAD COMPANY

v.

BOARD OF PUBLIC UTILITY COMMISSIONERS et al.

[No. 265.]

(— N. J. L. —, 136 Atl. 494.)

Appeal and review — Scope — Questions of fact — Extension of railroad siding.

1. A Commission order for the extension of a railroad siding will not be disturbed by the court on certiorari because of a claim that the extension is not workable on account of the grades, where there is evidence reasonably supporting the Commission finding that the extension is workable, p. 136.

Service — Jurisdiction of Commission — Extension of railroad siding on private land — Easements.

2. The Commission has no jurisdiction to order a railroad company to extend a siding on private property to adjoining land for use by the occupant of the latter land, unless there is adequate, not to say indubitable, proof of the existence of a valid easement over the primary tract, not merely in favor of the railroad, but available under the utility act in favor of the owner of the secondary tract, p. 136.

Rehearing — Grounds — Inadequate presentation of case — Extension of railroad siding.

3. The court, on certiorari to review a Commission order requiring a railroad to extend a siding on private property to adjoining land for use by the occupant of that land, ordered that a rehearing pursuant to § 38 of the Utility Act should be had before the Commission to determine the existence of a valid easement over the primary tract in favor of the railroad and available to the owner of the secondary tract, the matter not having been adequately presented to the Commission, p. 136.

[March 10, 1927.]

CERTIORARI to review an order of the Board of Public Utility Commissioners requiring a railroad company to extend a siding on private land to adjoining property for the use of the occupant of the latter land; rehearing before the Commission ordered.

Argued January term, 1927, before Parker, Black, and Campbell, JJ.

Appearances: McKirgan & Gilson, of Summit, for prosecutor; John W. Queen, of Jersey City, for the Board; Congleton, Stallman & Hoover, of Newark, for defendant Lombardy.

Per Curiam: [1] The writ brings under review an order of the Board made August 23, 1926, requiring the railroad company to extend an existing siding, now on property of the Newark Heights Supply Company, formerly of Lombardy, to adjoining property now occupied by Lombardy. The minor point is made that such a siding is not practically workable on account of the grades required. The Board, after careful examination, found otherwise, and we cannot say there was no evidence reasonably to support its finding.

[2, 3] The other point made is fundamental. It will be observed at once that an extension of the siding used by the Newark Heights Supply Company to adjoining land, and its use by the occupant of the latter land, involves an easement over the former Lombardy tract, now land of the supply company, in favor of the present Lombardy tract; and unless the existence of that right of easement is made to appear, the Board was plainly without jurisdiction to make an order which would involve the taking of the supply company property for the benefit of an adjoining owner.

It is claimed in support of the order that such right of easement did exist, and in this way: That Lombardy originally owned the supply company tract, and made a siding agreement with the railway company providing *inter alia* that that company "may use such side track in connection with any extension of the same which the party of the first part (the company) may desire to construct for the purpose of reaching business or industries other than that of the party of the second part" (Lombardy) with an added clause of right of user, etc. If this were clear on the facts, it might well be that notwithstanding the clause is apparently for the benefit of the railroad company, which by taking out this writ indicates its unwillingness to operate under it, yet under the Utility Act (P. L. 1911, p. 374), it would be compellable to exercise its right to accommodate an industry beyond the existing siding. We do not pass on this point, because we think it is not properly before us, the evidence as now presented failing to show the existence of an agreement binding either the railroad company or the lands of the supply company.

What appears is an unsealed writing dated September 20, 1923, between "the Rahway Valley Company, lessee, a corporation of New Jersey, of the first part, and Lombardy Company, Inc., party of the second part." This is signed for Rahway Valley Company by "R. A. Clark, President and General Manager," and attested by "R. A. Clark, Secretary." Then follows the signature, "Lombardy Company, Inc.," no individual being named as executing officer, with an "Attest: Louise Palmgren, Witness."

Assuming for the present that this document was properly executed for the Rahway Valley Company, lessee, the connection of that company with the present prosecutor does not appear. This, however, may be passed for the present. More important questions are, Is "Lombardy Company, Inc.," a corporation? If so, is the document in question so executed as to be binding on it? And, especially, did "Lombardy Company, Inc.," own the supply company tract at the time? If not, can the paper be regarded as binding on the actual owner, and on what theory?

Joseph Lombardy testified before the Board in his own behalf that the Lombardy Company "was the individual company,"

and that he "operated under the name of the Lombardy Company" as well as under other names.

Certain depositions were taken after allocatur of this writ in aid of our consideration of the case. It is objected that this is improper practice and that we should consider no evidence except that taken before the Board. The disposition we make of the case as now before us renders it unnecessary to decide this point, but it may not improperly be noted that one of depositions indicates that at the date of the agreement, title of record was in Joseph Lombardy, and that no title of Lombardy Company, Inc., appears of record.

We consider that a primary essential to jurisdiction of the Board to make the order under review was adequate, not to say indubitable, proof of the existence of a valid easement over the supply company land, not merely in favor of the railroad, but available under the Utility Act in favor of the owner of the secondary tract; the more so as it is quite obvious on the depositions that Joseph Lombardy is undertaking to assert such a right over the supply company tract in the face of his own personal warranty to his grantee of that tract that the premises were free of all incumbrances whatsoever, a point not made in the brief, but which we deem worthy of notice.

We consider that the case was not adequately presented to the Board, and should be reheard with full consideration of all its phases, and that among these the force and effect of the document of September 20, 1923, as binding the parties and conferring jurisdiction on the Board, should receive careful examination. Rehearing is accordingly ordered pursuant to § 38 of the Utility Act (P. L. 1911, p. 374), and any doubt as to the availability of the depositions may be cleared up by taking the same evidence anew before the Board.

No costs will be allowed.

Note.—Appeal and review.

I. Scope of review:

a. Order or judgments appealable, 139.

b. Questions open upon appeal, 139.

c. Conclusiveness of Commission's findings 139.

II. Parties on appeal, 140.

P.U.R.1928A.

I. Scope of review.

a. Order or judgments appealable.

A finding that the operation of a railroad in a village street is unsafe and hazardous is not a proper basis for a certificate of convenience and necessity for the construction of a connecting line between two points on an existing railroad, designed to furnish an alternative, safer and shorter means of transportation, although the new company is organized by the existing company; but such a finding might be a proper basis for an order requiring the relocation of a track of the existing company. Roy v. Illinois Commerce Commission ex rel. North Shore Connecting R. Co. No. 17477, 322 Ill. 452, 153 N. E. 648, Oct. 28, 1926.

b. Questions open upon appeal.

While the proceedings before the Public Utilities Commission are informal in character, yet, in the review of a petition in error filed in this court to reverse an order of such Commission on the ground that it is against the weight of the evidence, unlawful or unreasonable, this court will examine the entire record to determine whether such order is based upon sufficient evidence, received under the established and recognized rules for the production of evidence. Lykins v. Public Utilities Commission, No. 19790, 115 Ohio St. 376, 154 N. E. 249, Nov. 16, 1926.

c. Conclusiveness of Commission's findings.

In determining whether a rate, rule, regulation, or order of the Railroad Commission upon a subject within its authority is so unreasonable and arbitrary as to be illegal and unenforceable, the court, in deference to the governmental functions conferred by law upon the Commissioners, will not only require the prima facies of reasonableness impressed by the statute upon the rate, rule, regulation, or order to be overcome by admission or proofs but will require the admissions or proofs of facts tending to show unreasonableness to be clear and convincing, every reasonable doubt being yielded in favor of the rate, rule, regulation, or order. State ex rel. Burr v. Seaboard Air Line R. Co. — Fla. —, 111 So. 281, Jan. 10, 1927.

Findings of fact of the Corporation Commission are to be regarded as prima facie just, reasonable, and correct, but such presumption does not obtain where there is no competent evidence to support such finding. Bromide Crushed Rock Co. v. Dolese Bros. Co. No. 16672, 121 Okla. 40, 247 Pac. 74, June 8, 1926.

The prima facie presumption of the reasonableness, justness, and correctness of an order of the Corporation Commission, obtaining by reason of § 22, article 9 of the Constitution, applies only to the facts found by the Commission, or established by evidence upon

which the Commission failed to make a finding, and, where a fact material to the reasonableness, justness, and correctness of an order is lacking in the findings of fact made by the Commission and is not supplied by the evidence, the presumption obtaining by reason of said section does not apply, and on review in this court such order cannot be sustained. Chicago, R. I. & P. R. Co. v. State, No. 16064, 117 Okla. 175, 245 Pac. 656, Jan. 12, 1926.

Prima facie just, reasonable, and correct, in § 22, art. 9, is a presumption arising upon the findings of the Corporation Commission that the order based upon such facts is presumed on appeal in this court to be just, reasonable, and correct, subject to be overcome or rebutted by the facts in the record, as weighed and found by this court in reviewing the same. Chicago, R. I. & P. R. Co. v. State, No. 17016, 123 Okla. 31, 251 Pac. 1044, June 29, 1926.

This court has examined the record, including the testimony and the findings of the Commission in this case, and held that the findings of the Commission, when clothed with the presumption, are reasonable, just, and correct, and that the order of the Commission should be affirmed. Ibid.

In reviewing an order of the Commission permitting a railroad company to close a depot during a part of the year the court is not at liberty to substitute its judgment for that of the Commission unless it clearly appears that the order is unreasonable. Dryden Commercial Club v. Department of Public Works, No. 20370, — Wash. —, 252 Pac. 911, Feb. 10, 1927.

The supreme court of Wisconsin cannot reverse an order of the Railroad Commission affecting a grade crossing approved by the circuit court unless it is clearly unreasonable. Hudson v. Railroad Commission, — Wis. —, 212 N. W. 293, Feb. 8, 1927.

II. Parties on appeal.

In Crowell & Spencer Lumber Co. v. Louisiana Pub. Service Commission, 157 La. 676, 102 So. 866, Jan. 5, 1925, a Commission order entered in a proceeding in which some of the parties had not appeared and in which another party had made only a perfunctory defense, after the cause had been ordered to trial over its objection that an injunction operated as a bar to the proceeding, was set aside so that all parties in interest might have an opportunity to be heard before the Commission.

RHODE ISLAND SUPREME COURT.

PUBLIC UTILITIES COMMISSION
v.
EAST PROVIDENCE WATER COMPANY.

[Nos. 459, 460.]

(— R. I. —, 137 Atl. 387.)

Valuation — Credibility of expert testimony — Personal interest of witness — Water utility.

1. A conclusion that an expert's testimony, offered by a utility in regard to matters of valuation for a proposed rate increase, concerning which other evidence at trial affords a test, is colored by personal financial interest of the witness and of questionable value, may be a just ground for refusal to approve as accurate the submitted rate base, p. 142.

Rates — Reasonableness — Internal corporate relations — Water utility.

2. A question, raised by evidence as to the regularity of internal corporate relations affecting the fairness of proposed rates, justifies the withholding of approval thereof, until such doubt is dissipated by a full disclosure of the utility, p. 143.

Constitutional law — Appeal and review — Questions of fact and of law.

3. Questions of fact raised on appeal from an order of the Commission are not reviewable under a state constitutional provision (Const. Amend. Art. 12, § 1) giving the state supreme court "final revisory and appellate jurisdiction upon all questions of law and equity," p. 143.

Constitutional law — Reversal of Commission's findings of fact — Order for rehearing.

4. A reversal of a Commission's finding of fact, raised on appeal under a constitutional provision (Const. Amend. Art. 12, § 1) giving the state supreme court power "to sustain or reverse the order appealed from," must be in the form of an order for a Commission rehearing, p. 143.

[May 11, 1927.]

MOTION for rehearing on the affirmance of an appealed order of the Public Utilities Commission; motion denied. For former opinions, see — R. I. —, P.U.R.1927C, 417, 136 Atl. 447; See also, — R. I. —, 133 Atl. 347; — R. I. —, P.U.R.1926E, 668, 133 Atl. 804.

Appearances: A. Truman Patterson, town solicitor, and Her-

bert A. Rice, both of Providence, for town of East Providence; Edward P. Jastram, Claude R. Branch, William H. Edwards, II, and Edwards & Angell, all of Providence, for East Providence Water Company.

Per Curiam: The above-entitled proceeding is before us at this time, after opinion filed, upon the motion of the respondent for a rehearing.

We have carefully considered this motion, and have again reviewed the evidence presented before the Commission. We find nothing suggested in the motion which was not considered by the court before filing its opinion.

There is little, if any, dispute between the parties upon matters of law, and the court does not question the soundness of the authorities cited by the respondent as to its right to receive a fair return upon its property, used in furnishing its service as a public utility.

[1] The ground of the court's decision was that the respondent had failed to satisfy us by a preponderance of the evidence, as required by statute, that the proposed schedule of rates is just and reasonable. We are not satisfied as to the valuation of the rate base upon which the schedule is founded. Our determination in that regard is dependent upon the confidence which we felt warranted in giving to the expert evidence presented by the respondent. The mains which had been extended to the Massachusetts line, the value of fire hydrants included in the expert's schedule of values, and other matters of that nature, referred to in the opinion, we considered as not properly items of value to be considered in making up the rate base. The particular importance which we ascribed to those matters, however, was the light which the expert's testimony with regard to them afforded us in testing that witness' candor and impartiality. Of the same nature was his testimony with regard to his methods of fixing the rate charged for fire protection to the town, his original testimony as to the so-called standby charge, his testimony in support of the fairness of the rate which the water company in the past had secretly made to its owner for the low-pressure service to the Glenlyon Dye Works, which rate we found to be less than the

cost of the service, and discriminatory. Of the same character appears to us to be the impression which the witness sought to create as to the propriety of the dealings between the water company and its owner with reference to Omega pond. Our conclusion as to the value of the witness' testimony in regard to those matters, concerning which the evidence afforded some test, led to the not unreasonable conclusion that as to the important matter of prices and values his testimony was also colored by the financial interest of his employer.

[2] Furthermore, the dealings of the owner of this utility with it and with its property affects the justness of the proposed schedule as it relates to other customers of the respondent. As to the fairness of such dealings the evidence raises a grave doubt in our minds. Upon a full disclosure such doubt may be removed, but, until there has been such disclosure, we cannot approve the schedule as fair and reasonable.

[3, 4] As bearing upon the nature of the order which we should make upon this appeal, the respondent appears to regard as important the constitutional provision (Const. Amend. art. 12, § 1) giving to the supreme court "final revisory and appellate jurisdiction upon all questions of law and equity." It might well be said that questions of fact and not of law have been raised by the appeal and determined by the court. These appeals come to us under another provision of the Constitution (Const. Amend. art. 12, § 1) giving to this court "such other jurisdiction as may, from time to time, be prescribed by law." Our jurisdiction upon appeal from the orders of the Utilities Commission is one prescribed by law, and must be exercised in accordance with that law. Under such appeal questions of fact, as well as of law, are brought to the supreme court. We are given jurisdiction to pass upon such questions, and in accordance with our determination to either "sustain or reverse the order appealed from." There can be no reasonable doubt as to the meaning of that statutory provision. If no provision for appeal from an order of the Commission had been given by the statute, then for alleged error of law we might by means of extraordinary process have the order of the Commission certified to us for review under the constitutional provision which the

respondent cites; and, if we found the assignments of error to be supported, our judgment would then be that the record of the Commission be quashed, not that there be a rehearing before the Commission. The respondent's contention in this regard is clearly without merit.

The motion for reargument is denied.

If the motion for reargument be denied, counsel have stated their wish to be heard, upon some matter to be included in the final order of this court, in addition to the order reversing the order of the Commission. We will hear counsel upon the question of such additional matter at such time as suits their convenience.

RHODE ISLAND SUPREME COURT.

PUBLIC UTILITIES COMMISSION

v.

EAST PROVIDENCE WATER COMPANY.

[Nos. 459, 460.]

(— R. I. —, 137 Atl. 873.)

Appeal and review — Procedure — Decree or direction to enter order.

The supreme court of Rhode Island after hearing upon appeal from a Commission rate order should enter its final decree as the final determination of the matter instead of directing the Commission to enter a final order or decree upon its record with intent to make the final determination that of the Commission.

[June 16, 1927.]

HEARING to fix the form of final order or decree upon appeal from Commission rate orders; form of decree prescribed. For Commission decision, see P.U.R.1926E, 641. See, also, — R. I. —, P.U.R.1928A, 141, 137 Atl. 387; — R. I. —, 133 Atl. 347; — R. I. —, P.U.R.1926E, 668, 133 Atl. 804; — R. I. — P.U.R.1927C, 417, 136 Atl. 447.

Appearances: A. Truman Patterson and Herbert A. Rice, both of Providence, for town of East Providence; Edwards & Angell, of Providence, for East Providence Water Company.

Per Curiam: The above-entitled proceedings are before us to fix the form of final order or decree which shall be entered upon the appeals.

After further examination of the provisions of the Public Utilities Act, we hold that, although the final determination of the Commission fixing rates is in the form of an order, § 37 of the Act (Gen. Laws 1923, § 3700), requires that, after hearing upon appeal, this court shall make a final decision, and in conformity with such final decision shall thereafter enter its final decree. The decree so entered is the final determination of the matter brought to this court upon appeal. The cause remains in this court, as do also the papers, unless by reason of some circumstance this court shall by special order direct the papers to be placed in the custody of the Public Utilities Commission, in which latter case said papers shall continue subject to the control of this court.

The practice suggested by the complainant of directing the Commission to enter a final order or decree upon its record, with intent to make the final determination that of the Commission, is not warranted by the act, and is contrary to the scheme of appeal prescribed by the General Assembly. We have, however, entered a general order that in all cases a copy of the final decree of this court shall be certified to the Commission that it may have authoritative notification of the final action of this court.

We will not at this time consider any form of order directing the complainant to make reimbursement of any portion of the rates collected under the schedule which we have not approved. The complainant has stated to the court that it will seek to obtain from the Federal Supreme Court a review and reversal of the decision and decree of this court. If the complainant shall fail within a reasonable time to seek such review of our decree, or if it shall fail to obtain such reversal, the appellants may then by motion renew their application for an order of reimbursement, which motion will then be considered upon its merits. Such motion will be regarded as one asking for a supplemental and administrative order with regard to a matter which remains within our jurisdiction.

On June 21, 1927, the appellants may present a form of final decree which shall contain the introduction and first paragraph of the decree already presented by the appellants, but shall not contain the order for reimbursement or the order for certification of a copy of the final decree.

WISCONSIN SUPREME COURT.

MUSCODA BRIDGE COMPANY

v.

VILLAGE OF MUSCODA et al.

(— Wis. —, 214 N. W. 435.)

Franchises — Indeterminate permit statutes — Interpretation — Bridge.

1. Mandatory statutes altering, amending, or repealing existing franchises of specifically mentioned public utilities and creating indeterminate permits must be strictly construed, and only such utilities as are expressly designated are affected thereby, p. 148.

Franchises — Indeterminate permits — Statutory designation of utility not retroactive.

2. A statute declaring a particular utility to be a public utility need not have the effect of bringing it under a former law (1907, Chap. 499) giving public utilities the right to exchange franchises for indeterminate permits, nor can it make the utility subject to a subsequent statute (1911, Chap. 596) making mandatory the surrender but specifically designating the utilities so affected, p. 148.

Monopoly and competition — Exclusive franchise — Protection from competitor — Toll bridge.

3. A toll bridge utility operating under an alleged indeterminate permit is not protected from competition by a law (§ 196.50—Stat. 1925) expressly limiting such protection to heat, light, water, power, and telephone utilities, p. 149.

Monopoly and competition — Restriction on bridge utility — Inalienable state power over highways.

4. The legislative distinction between toll bridges and other public utilities, in refusing to the former monopolistic protection granted to the others, is grounded in the intention that the state should not be hampered in its governmental function of providing the public with highways and incident bridges, and that it should not be obliged to go to the Railroad Commission or any other body for permission to exercise that function, p. 149.

Constitutional law — Inherent power of state over highways — Confiscation of property — Toll bridge.

5. A toll bridge company accepts its franchise from the state subject to and with notice of the right of the state to build a free bridge beside its structure and such construction is not, therefore, a confiscation of the utility's property, p. 149.

Rates — Power of state to regulate rates — Property devoted to public use — Bridge.

6. State regulation of rate of tolls does not give a utility the exclusive right to maintain its bridges, since by devoting its property to public use, it subjects the same to state regulation, p. 150.

[June 20, 1927.]

Appeal from order of trial court dissolving temporary injunction of toll bridge operation against State Highway Commission et al; affirmed.

The Muscoda Bridge Company brought an action to restrain the village of Muscoda, the town of Eagle, the counties of Grant and Richland, and the state highway commission from erecting a free bridge across the Wisconsin river, at Muscoda, Wisconsin. From an order dissolving a temporary injunction the bridge company appealed.

In 1866 the Legislature granted to the predecessor in title of the Muscoda Bridge Company a franchise to erect a toll bridge across the Wisconsin river, at Muscoda. In July, 1923, proceedings were begun for the erection of a free bridge across this river at Muscoda.

Appearances: Kopp & Brunckhorst, of Platteville, for appellant; Grady, Farnsworth & Walker, of Portage, John W. Reynolds, Attorney General, and Suel O. Arnold, Assistant Attorney General, for respondents.

Stevens, J.: The franchise for the construction of the appellant's toll bridge was not exclusive. Plaintiff bases its right to enjoin the construction of the new bridge upon the claim that it has an indeterminate permit, under the public utility law, and that neither the state nor any of its municipal subdivisions has the power to erect a competing bridge unless a certificate of convenience and necessity is secured authorizing the erection of such bridge. No such certificate has been secured.

When the public utility law was passed, toll bridges were not

declared to be public utilities. But by chapter 48, Laws of 1911, the statutes were so amended as to make toll bridges public utilities. But the statutes contain no legislative declaration that the franchises of toll bridges are indeterminate permits.

[1] If the franchise of toll bridges have become indeterminate permits, that result must follow from the simple fact that these bridges were declared to be public utilities. Undoubtedly, the legislature possessed the power to alter or repeal the franchise granted to the bridge company's predecessor by legislative act. But the intent to repeal or alter an existing franchise must be clearly expressed. Such intent will not be implied from doubtful or ambiguous language. No act clearly expressing such legislative intent has been passed by the legislature. When the legislature determined that existing franchises should be altered or amended under the reserved power, it clearly designated the particular public utilities whose franchises were made indeterminate permits. It left nothing to implication. It limited the exercise of the reserve power to utilities which furnish heat, light, water, power, and telephone service. Subdivision 5 of § 196.01 and § 196.55 of the statutes.

[2] If the mere legislative declaration that a utility was a public utility necessarily resulted in the franchise of the utility becoming an indeterminate permit, there would have been no necessity for the passage of chapter 596, Laws of 1911, which altered and amended the franchises of all utilities supplying water, light, heat, power, and telephone service so as to make the same indeterminate permits, because all utilities mentioned in that act had been declared to be public utilities when the act was passed in 1907. That it was not the legislative intent to make the declaration that a utility was a public utility equivalent to the granting of an indeterminate permit is shown by the fact that § 1797m–77 of the statutes, chapter 499, Laws of 1907, gave the public utility a right to elect to surrender its franchise and receive an indeterminate permit in lieu thereof. This provision evidences a clear legislative intent not to make the granting of an indeterminate permit automatically follow the legislative declaration that a utility is a public utility. It was not until the passage of chapter 596, Laws of 1911, that the legisla-

ture exercised its reserve power to make the franchise of all companies supplying heat, light, water, power, or telephone service indeterminate permits.

[3] The only limitation which the legislature has imposed upon the right to construct and maintain competing plants is found in § 196.50 of the statutes. Again, it will be noted that the right to maintain an existing utility without competition from a new plant is confined by the express terms of the statute to those utilities which supply heat, light, water, power, and telephone service. Even if the appellant possessed an indeterminate permit, it would not be protected from competition under the express terms of § 196.50 of the statute.

[4] There is a very legitimate basis for the distinction which the legislature has made between utilities which serve local communities with such necessities as water, light, heat, and power and those utilities whose bridges form a part of the public highways that serve all the people of the state. If appellant's position is sound, it means that the legislature has committed to the appellant, bridge company, the function of maintaining a part of the public highways of the state for all time, or at least to the time when the state procures a certificate of convenience and necessity that will authorize the construction of such a bridge as the one here in question. In the absence of a clearly expressed legislative intent, the statutes should not be given a construction that will lead to such an unfortunate result. But the legislature has clearly expressed its intent that the state should not be hampered in this manner in the performance of one of its most important governmental functions—that of providing the public with highways over the land and across the rivers of the state. The state is not required to go to the Railroad Commission or to any other body to secure permission to exercise its governmental function of constructing and maintaining highways over the land or across the waters of its rivers. The state has that inherent power.

[5] The building of a free wagon bridge near appellant's toll bridge does not result in a confiscation of appellant's property. Appellant and its predecessors accepted and operated under a franchise which contained no engagement on the part of the

state that another bridge should not be erected or that improvements should not be made that would diminish the amount of its income. For the plainest reasons, so clearly stated in Charles River Bridge v. Warren Bridge, 11 Pet. 420, 548–553, 9 L. ed. 773, 824–826, it must be held that the franchise of the plaintiff, bridge company, did not give it the right to prevent the state from building a free bridge beside its structure. The bridge company has enjoyed the right to collect tolls of all who crossed the Wisconsin river at this point, for sixty years, without competition of any kind.

[6] The fact that the state has exercised its power to regulate the rate of tolls charged does not give the appellant the exclusive right to maintain this bridge. By devoting its property to a public use, it subjected its bridge to regulation by the state. The state acted within the realm of its well-established powers when it determined to construct a free bridge at the place here in question. The procedure taken complies with the requirements of the statute. The trial judge was clearly right in dissolving the temporary injunction.

Order affirmed.

Vinje, C. J., took no part.

Note.—Franchises.

I. In general, 150.
II. Termination, 151.

I. In general.

Under Code of 1915, § 3564, subsecs. 67–70, 90, a franchise to maintain and operate an existing water plant and to make additions, extensions, and betterments, may be granted by ordinance by a city without a referendum to the people. Asplund v. Santa Fe, No. 3127, — N. M. —, 244 Pac. 1067, Feb. 11, 1926.

Application to the Commission for a certificate to operate motor busses as required by an ordinance granting consent to use the streets, and the incurring of a large financial obligation in connection with the application, was held to be indicative of an acceptance of the ordinance, although the Commission has not acted upon the application. Colonial Motor Coach Corp. v. Oswego, 126 Misc. 829, 215 N. Y. Supp. 159, April 2, 1926.

An ordinance, granting a franchise giving the grantee thereof a right to construct, maintain, and operate for a specified term of

years an electric light plant for the distribution and sale of electric current to the inhabitants of the municipality, which provides that the holder of the franchise shall pay to the municipality 1½ per cent of the entire gross receipts of the plant when the same exceeded $5,000 per year is not an attempt to enact revenue legislation within the meaning of article 5, § 59 and article 10, § 14 of the Constitution. Huffaker v. Fairfax, 115 Okla. 73, 242 Pac. 254, Nov. 24, 1925.

The supreme court of appeals of West Virginia has held that where a municipality has permitted a company, without a franchise to expend a considerable sum in supplying its inhabitants with gas, the municipality may be estopped to prevent the company from maintaining its pipe line system as established. Marmet Gas Co. v. Marmet, 102 W. Va. 605, 135 S. E. 839, Nov. 23, 1926.

II. Termination.

Under a franchise ordinance giving an electric company the right to use the city streets for its distribution system and providing that the city may terminate upon notice all rights and agreements in the ordinance except the right to use the streets, alleys, and public places for the construction and operation of the company's high tension lines, with a further provision that in the event the city terminates the franchise, it will purchase the extensions, additions, or improvements made to the distribution system, it is held that the city may terminate such franchise without first having paid for the property. It has been said that the purchase of the property and paying for the same is not a condition precedent to the right to terminate or oust the company. "Fayetteville v. Fayetteville Water, Light & P. Co. 135 Fed. 400; Pomeroy's Specific Performance of Contracts, §§ 148–151; Herrman v. Babcock, 103 Ind. 461, 3 N. E. 142; Bristol v. Bristol & Warren Water Works, 19 R. I. 413, 34 Atl. 359, 32 L.R.A. 740." Sac City v. Iowa Light, Heat & P. Co. No. 38467, — Iowa —, 214 N. W. 571, July 1, 1927.

Under a franchise ordinance giving a city the right to terminate upon notice and in which the city agrees to purchase the distribution system of an electric utility, the question of pay for the betterment of the utility is so inherently a part of the issues in a suit to enjoin further operation in the city after termination of the franchise that a determination of the amount due from the city to the company is necessary to a proper disposition of the case, and an order for the writ of removal and ouster should not issue until the amount due the company is legally determined. Ibid.

A street railway company was relieved from a franchise obligation to pave between the tracks, where rates sufficient to meet the expense would be defeated by a decrease in passenger use. Re Benton Harbor-St. Joe R. & Light Co. (Mich.) D-2186, May 18, 1926.

CALIFORNIA RAILROAD COMMISSION.

MUNICIPAL LEAGUE

v.

SOUTHERN PACIFIC COMPANY et al.

[Case No. 970.]

CENTRAL DEVELOPMENT ASSOCIATION OF LOS ANGELES

v.

SOUTHERN PACIFIC COMPANY et al.

[Case No. 971.]

CIVIC CENTER ASSOCIATION OF LOS ANGELES

v.

SOUTHERN PACIFIC COMPANY et al.

[Case No. 972.]

CITY OF PASADENA

v.

PACIFIC ELECTRIC RAILWAY COMPANY et al.

[Case No. 974.]

CITY OF ALHAMBRA

v.

PACIFIC ELECTRIC RAILWAY COMPANY et al.

[Case No. 980.]

CITY OF SAN GABRIEL

v.

PACIFIC ELECTRIC RAILWAY COMPANY et al.

[Case No. 981.]

CITY OF SOUTH PASADENA

v.

PACIFIC ELECTRIC RAILWAY COMPANY et al.

[Case No. 983.]

RE SOUTHERN PACIFIC COMPANY et al.

[Application No. 3346.]

[Decision No. 18593.]

Interstate Commerce — State Commission jurisdiction for terminal construction.

1. Where the United States Supreme Court has decided that a certificate of the Interstate Commerce Commission must be a condition precedent to the validity of an order by a State Railroad Commission to erect an interstate union station, and an ensuing certificate of approval from that body prescribes tentative limits for such construction, the State Commission in subsequent proceedings cannot vary the plans to the extent of approving "separate terminal" facilities under such certificate, p. 154.

Interstate Commerce — Effect of Interstate Commerce Commission's findings — Railroads.

2. In the absence of contrary evidence, a State Railroad Commission, in proceedings supplemental to the issuance of a certificate of approval by the Interstate Commerce Commission for the erection of an interstate union terminal, may assume the comparative accuracy of the estimate of the Interstate Commerce Commission as to probable costs, p. 162.

Interstate Commerce — State proceedings supplemental to Interstate Commerce Commission certificate.

3. Acting under an original certificate from the Interstate Commerce Commission, the State Railroad Commission entered an order specifically conditioned upon the promulgation by the Interstate Commission of such further certificates and findings as might be necessary to authorize the construction, extensions, and abandonment incident to the establishment of an interstate union terminal, directed therein, p. 163.

[July 8, 1927.]

En banc. PROCEEDINGS by the Commission at the request of the parties in interest supplemental to reversal of former order and decision of United States Supreme Court referring same to Interstate Commerce Commission and subsequent decision of the latter authorizing reopening of this cause.

Appearances: Hugh Gordon, for Central Development Association; James H. Howard, City Attorney, and Roscie R. Hess, Deputy City Attorney, for city of Pasadena; C. W. Burbrow, for Southern Pacific Company; A. S. Halsted and Fred E. Pettit, Jr., for Union Pacific & Los Angeles & Salt Lake Railroad Company; E. W. Camp, for the Atchison, Topeka & Santa Fe Railway Company; Frank Karr, for Pacific Electric Railway

Company; Jess E. Stephens, City Attorney, Milton Bryan, Deputy City Attorney, and Max Thelen, Special Counsel, for city of Los Angeles; H. H. Sanborn, A. B. Roehl and Spencer Thorpe, for W. H. Daum, intervener; H. R. Brashear, for Los Angeles Chamber of Commerce; George A. Damon for Regional Planning Commission and City Planning Association; Will D. Gould, for Northwest Association.

By the **Commission**: The facts and issues primarily involved in these proceedings, together with the early history thereof, are to be found in our prior Decisions Nos. 8901 and 9838 herein, and require no repetition here.

Action of State Supreme Court.

Subsequent to the rendition of Decision No. 9838, writs of review were obtained from the California supreme court by the Atchison, Topeka & Santa Fe Railway Company, the San Pedro, Los Angeles & Salt Lake Railroad Company, and the Southern Pacific Company, and on December 19, 1922, that court annulled our said Decision No. 9838 upon the ground that, by reason of the enactment by Congress of certain amendments to the Interstate Commerce Act in 1920:

"Full power and authority over the matter of union terminal depot facilities of the railroads who are largely engaged in interstate commerce . . . has been vested in the Interstate Commerce Commission under the terms of said amendatory act of 1920, and that by virtue thereof the Railroad Commission of California . . . has been divested of the power, authority, and jurisdiction over that subject, sought by it to be exercised in the several proceedings before it and by the order presented for review herein." (Atchison, T. & S. F. R. Co. v. Railroad Commission, 190 Cal. 214, 211 Pac. 460, 465.)

Action of United States Supreme Court.

[1] Affirming this result, but upon narrower grounds, the United States Supreme Court, in proceedings brought before it under writs of certiorari obtained by this Commission, declared, on April 7, 1924 (cited below) that the only question before it was "whether the power to direct a new union station with its

incidents is committed exclusively to the Interstate Commerce Commission under the Act of 1920," and held that:

"Until the Interstate Commerce Commission shall have acted under paragraphs 18 to 21 of § 402 of the Transportation Act, the respondent railways cannot be required to provide a new interstate union station and to extend their main tracks thereto as ordered by the State Railroad Commission."

The Court further said that such action requires: "a certificate of the Interstate Commerce Commission is a condition precedent to the validity of any action by the carriers, or of any order by the State Commission," together with a finding "that the expense involved will not impair the ability of the carriers concerned to perform their duty to the public." (Railroad Commission v. Southern P. Co. 264 U. S. 331, 68 L. ed. 713, P.U.R. 1924D, 246, 254, 44 Sup. Ct. Rep. 376.

Action of Interstate Commerce Commission.

Subsequent to the rendition of the California supreme court's decision above mentioned, but prior to that of the United States Supreme Court, the city of Los Angeles filed with the Interstate Commerce Commission a petition asking that these carriers be required to erect a union passenger station in the city of Los Angeles substantially in the manner ordered by this Commission in its Decision No. 9838 (I. C. C. Docket No. 14778). With reference to this action, the United States Supreme Court declared that the course pursued by the city of Los Angeles was correct. This Commission intervened on behalf of the city in said proceeding, and after lengthy hearings, the Interstate Commerce Commission, on July 6, 1925, issued its order. (100 Inters. Com. Rep. 421.)

Upon the rendition of the decision of the United States Supreme Court two other applications were filed with the Interstate Commerce Commission. In the first of these (Finance Docket No. 3556), the Southern Pacific Company and Southern Pacific Railroad Company sought authority to abandon main line train operation over a portion of their railroad along Alameda Street in Los Angeles. In the second (Finance Docket No. 3569), these companies and the Los Angeles and Salt Lake Rail-

road Company together sought from the Interstate Commerce Commission certificates of public convenience and necessity approving a plan for the joint use of the present Southern Pacific passenger station in Los Angeles (sometimes referred to as the "Arcade station") by said companies substantially in the manner requested several years ago by these carriers in Application No. 3346 before this Commission, which application had been dismissed by us in our Decision No. 9838 herein. In its decision of July 6, 1925, above mentioned, the Interstate Commerce Commission found that public convenience and necessity does not require the construction proposed and described in this connection, and the application of these carriers involving authority to construct extensions looking toward such joint use of the said Southern Pacific station (Finance Docket No. 3569) was denied.

Upon the issue presented by the complaint of the city of Los Angeles, however, the Interstate Commerce Commission declared that the service afforded by the present passenger stations of the Atchison, Topeka & Santa Fe Railway and Los Angeles & Salt Lake Railroad is "unreasonable and inadequate," and that the expenditure of considerable sums of money must at once be made in order to provide reasonable and adequate facilities in lieu thereof; that railroad service, except industrial freight-switching service, should be eliminated from Alameda street, and that such action will force the Southern Pacific Company either to provide new means of access to its Arcade station or to abandon the same and provide other facilities, the expenditure of substantial sums of money being required on the part of this carrier in either event. The interstate body then found that these carriers are in a position to provide reasonable and adequate station facilities, and that "the expense involved will not impair their ability to perform their duties to the public." Thus the first requirement of the United States Supreme Court was met.

We shall not here recount in detail the discussion of the Interstate Commerce Commission upon the general subject of a union passenger terminal in Los Angeles. Suffice it to say that that body approved the selection of a site for such a union passenger terminal within a described area near the Plaza in Los Angeles which had been made in our Decision No. 9838 herein, and, up-

on consideration of the evidence before it, and after a discussion of the advantages of such a solution of this problem, it declared that, in its opinion, a union passenger terminal could be erected upon the said Plaza area in compliance with our former order for a sum aggregating approximately $9,500,000 or at a new money cost of about $5,500,000. A large portion of this particular site is already owned by the Southern Pacific Company. The Interstate Commerce Commission further declared that future extensions or enlargements at the Arcade site would be considerably more expensive, in its opinion, than at the Plaza area, and it added that

"Adequate and convenient union passenger terminal facilities can be provided in the Plaza area at a considerably less net new money cost than less adequate and convenient facilities under applicants' Arcade plan, and for approximately the same net new money cost as a union passenger terminal of more questionable merit on the present Arcade site." (100 Inters. Com. Rep. at p. 458.)

The Interstate Commerce Commission then made the following findings:

"1. That the present and future public convenience and necessity permit the abandonment of operation of all passenger and freight train service, except industrial freight-switching service, on the main line of the Southern Pacific on Alameda street from College street to East Fifteenth street, inclusive, in the city of Los Angeles, California.

2. That neither the present nor future public convenience and necessity require or will require the construction or extension by applicants of new or existing main lines of railroad in the city of Los Angeles, California, as described in the application in Finance Docket No. 3569.

3. That the present and future public convenience and necessity require and will require (*a*) the extension by defendants of their respective main lines of steam railroad in the city of Los Angeles, California, so as to reach and properly serve any union passenger station and terminal within that portion of said city bounded by Commercial street, North Main street, Redondo street, Alhambra avenue, and the Los Angeles river, which they

or any of them may construct and establish in accordance with a lawful order of the Railroad Commission of California, and (*b*) the extension of their respective main lines so as properly to provide for the rearrangement of passenger and freight routes incidental to the convenient and proper operation of such union passenger station and terminal.

4. That the extensions referred to in the preceding paragraph are reasonably required in the interest of the public convenience and necessity, and that the expense involved therein will not impair the ability of defendants to perform their respective duties to the public.

5. That, in addition to the abandonment of service on Alameda street as above authorized, the present and future public convenience and necessity permit the abandonment by defendants of such portions of their respective main lines of steam railroad in the city of Los Angeles, California, or of the operation of all or any portion of the present interstate train service thereon as may be incidental to the rearrangement of passenger and freight routes, of tracks, and of terminal facilities, made necessary or proper in connection with the construction and establishment by defendants, in accordance with a lawful order of the Railroad Commission of California, of a union passenger station and terminal within that portion of said city described in paragraph 3 above.

6. That the use by any defendant steam carriers of so much of the terminal main-line track or tracks of any of the other defendant steam carriers in the city of Los Angeles, California, as may be incidental, and necessary or convenient, to the proper operation of any such union passenger station and terminal as defendants, or any of them, in accordance with a lawful order of the Railroad Commission of California, may construct and establish in that portion of said city described in paragraph 3 above, is in the public interest and is practicable, without substantially impairing the ability of the carrier or carriers owning or entitled to the enjoyment of such track or tracks to handle its or their own business.

An order will be entered denying the application in Finance Docket No. 3569. We are not advised what action, if any, the

Railroad Commission of California will take in connection with these matters, and under the existing circumstances we will issue no certificates or further orders at this time. We will retain jurisdiction of No. 14778 and Finance Docket No. 3556 for the purpose of making such further findings and orders and issuing such certificates as the record warrants. The findings and order now made are based upon the present record and upon the plans presented to us. If, in the development of a union passenger terminal plan, the carriers or the Railroad Commission of California evolve a plan considerably more extensive than, or materially different from, a plan for a station within the Plaza area as here considered to be in the public interest, our ultimate findings as to the public convenience and necessity, and as to impairment of the carriers' ability to handle their own traffic and to perform their duties to the public, will of course be based upon a consideration of those facts rather than upon the present record."

(100 Inters. Com. Rep. at pp. 459–461.)

Thus the Interstate Commerce Commission provided for compliance with the second requirement of the United States Supreme Court.

Further Proceedings Before This Commission.

Subsequent to the rendition of this decision, and upon request of certain of the parties to these proceedings, this Commission reopened the above-entitled matters for further consideration and determination. Hearings were had before the Commission sitting *en banc;* evidence was taken from a large number of interested persons dealing with the subject from every angle, and voluminous briefs have been filed.

In view of our previous findings and order herein, and of the order and decision of the Interstate Commerce Commission relating to this matter, it would appear that in these reopened proceedings the chief question before us is whether, since the rendition of our Decision No. 9838 herein, any facts have developed or any events have occurred of such a character as to justify action on our part reversing the position which we have heretofore taken in this matter.

At the hearings in the reopened proceedings, after making certain technical objections to our jurisdiction to proceed further with these matters— which objections were overruled—the carriers again presented their plan for a solution of the passenger terminal problem in Los Angeles by the use of separate facilities, including the joint use of the Arcade station of the Southern Pacific Company by that company and the Salt Lake Railroad Company, together with the erection of a new station on the part of the Santa Fe at its present passenger station site. While we have listened to this testimony and have received briefs dealing with the subject, it is our opinion that, in view of the action of the Interstate Commerce Commission in this matter, we could not now—even if we were so disposed— authorize or direct the execution of this plan. The proposal of the carriers, as presented to us in these reopened proceedings, is in all essential respects similar to that formerly presented to us in Application 3346, heretofore dismissed by us, and also to that presented to the Interstate Commerce Commission in Finance Docket No. 3569, which was denied. Except for slight changes in detail, and save for certain other minor changes in the proposed participation of the Pacific Electric Railway Company in the plan, it is the same as hereinbefore dismissed. Although in these reopened proceedings we have given full opportunity for the production of all testimony desired to be offered in support of this plan for separated facilities, nothing, in our opinion, has been added to the record already before us in this connection which would impel us to reverse our former opinion as to this proposal. We will, therefore, again dismiss this application on the part of the carriers.

Since the date of our Decision No. 9838, certain of the dangerous grade crossings along the Los Angeles river have been and are being eliminated by means of the erection of viaducts crossing the river and the railroad tracks lying adjacent thereto and on both sides thereof, under and by virtue of orders issued by this Commission in a proceeding known as Application No. 9671 filed by the city of Los Angeles, county of Los Angeles, Atchison, Topeka & Santa Fe, Los Angeles and Salt Lake & Pacific Electric Railway companies. The Alameda street grade

crossings have not as yet been eliminated, nor has the Southern Pacific Company moved to eliminate main line train movements thereover—though conditions at these crossings are admittedly becoming worse day by day—save by again pressing before this Commission and the Interstate Commerce Commission the carriers' plan for separated facilities herein dismissed. Moreover, the Alameda street situation has been somewhat changed and apparently aggravated by the interjection of certain Salt Lake trains using a portion of that street as a means of temporary access to the Arcade station. Some freight movements have been transferred by the Southern Pacific Company from Alameda street to the river bank tracks, but the evidence indicates that the situation along that street as a whole is no less aggravated than it was at the time of our former order herein.

Much evidence was introduced by the carriers in these reopened proceedings dealing with certain proposed participation of the Pacific Electric Railway, an electric street and interurban carrier and Southern Pacific subsidiary, in the carriers' separated facilities plan. There were also presented a number of proposals for union passenger terminals in the city of Los Angeles differing to a greater or less degree from those hitherto filed herein, and located both within the so-called Plaza site or area, as defined in our Decision No. 9838 herein, and in other locations. Such proposals were presented by W. H. Daum, who filed a complaint against these carriers (Case No. 2177) praying for an order directing them to erect a union passenger depot at a site on the east bank of the Los Angeles river between Seventh and Ninth streets; by the Municipal League of Los Angeles for a "twin station" with head houses on each side of the river near Sixth street; by George D. Hall for a union station to face a new Plaza at the junction of Spring street and Sunset boulevard; by the Allied Architects' Association, through Charles H. Cheney, for a station with head house fronting on Temple street and Los Angeles street, with tracks extending north from Temple street between Los Angeles and San Pedro streets; by Joseph A. Stark for a station in an area bounded by Los Angeles, San Pedro, First, and Market streets, fronting on Los Angeles street; by A. D. Austin for a station in an area bound-

ed by First, Plaza, Main and Los Angeles streets; and, after inquiry upon our part, a plan prepared in the offices of the carriers for a station within the Plaza area considerably greater in extent and different in character from those heretofore presented for a station within that area.

We have carefully considered the testimony adduced in favor of each of these several proposals, together with the briefs filed in support thereof, and while some of these plans appear to possess certain merit, it is our opinion that in the case of none of them has evidence or argument been produced before us sufficient to justify us in reversing our findings and rulings heretofore entered herein and presented to and approved by the Interstate Commerce Commission.

[2] In this connection we should state that further testimony was presented, both by the city of Los Angeles and by certain members of this Commission's staff, upon the question of the availability, accessibility and propriety of the Plaza area, as defined in our Decision No. 9838 herein, and in the decision of the Interstate Commerce Commission in Docket 14778, 100 Inters. Com. Rep. 421, for a union passenger terminal station in Los Angeles. Much testimony was also adduced from various sources dealing with the probable cost of such a station. This testimony, in our opinion, fails to support the contention made on many occasions by the carriers that this plan involves the expenditure of "from twenty-five to forty-five millions of dollars." We find no basis in the evidence before us which would make possible such a contention, and we are of the opinion that the findings made by the Interstate Commerce Commission, as briefly outlined above, to the effect that an adequate union passenger terminal station, together with the necessary facilities for access thereto, can be constructed within this area for an amount approximately $9,500,000, and at a net new money cost not to exceed approximately $5,500,000, are not subject to serious question. Much of the testimony brought before us in these reopened proceedings concerned a proposal for a union station in the Plaza area presented by George S. Hill of this Commission's staff. (Commission's Exhibit 4-b herein.) This proposal is identical in all essential respects to the plan suggested by Mr. Hill before

the Interstate Commerce Commission, that body having had it before it as illustrative of the possibilities of the Plaza area.

In its analysis of probable costs, the Interstate Commerce Commission has set forth its conviction that adequate passenger terminal facilities can be constructed by these carriers in this area, together with all necessary trackage connections and rearrangement for a sum which it declares to be reasonable and proper. We find in the testimony before us no reason to doubt that the findings of probable cost so made by the Interstate Commerce Commission are correct, and we are of the opinion that adequate passenger terminal facilities can be erected upon this site for a cost of approximately $10,000,000 gross, and of approximately $5,500,000 net new money.

The Interstate Commerce Commission has made its findings definitely denying the application of the carriers to put into effect their plan for separated passenger terminal facilities, and it has also found that upon the rendition of a lawful order of this Commission requiring the erection of a union passenger depot within this area, under plans not materially differing from those presented to it, it will issue its certificates in connection with these matters under the requirement of the decision of the United States Supreme Court.

[3] We shall, therefore, enter herein an appropriate order. The effectiveness of our order herein will be specifically conditioned upon the promulgation by the Interstate Commerce Commission of such further certificates and findings as may be necessary or proper to authorize the construction, extensions, and abandonment herein directed, it being our intent and purpose that the further findings and certificates mentioned by the Interstate Commerce Commission in its decision in its Docket No. 14778, *supra,* and its Finance Docket No. 3556 be made prior to this order going into effect. We will direct our attorney to call this matter to the attention of the Interstate Commerce Commission by proper petition.

ORDER.

Complaints and an application having been filed, as above

entitled, said matters having been reopened for further hearing and determination, hearings having been had, testimony having been presented, briefs having been filed, the said matters having been submitted for decision, the Commission having considered said testimony and briefs, and being now fully informed in the premises, and basing its order upon the findings hereinbelow set forth and upon such other findings and statements of fact as are included in the opinion herein:

It is hereby found as a fact:

(1) That the present and future public convenience and necessity permit the abandonment of operation of all passenger and freight train service, except industrial freight-switching service, on the main line of the Southern Pacific Company on Alameda street from College street to East Fifteenth street, inclusive, in the city of Los Angeles.

(2) That neither the present nor future public convenience and necessity require or will require the construction or extension of new or existing main lines of railroad in the city of Los Angeles, as described in Application No. 3346 and in the record adduced herein.

(3) That the present and future public convenience and necessity require and will require (a) the extension by defendants in Cases Nos. 970, 971, 972, 974, 980, 981, and 983 of their main lines of steam railroad in the city of Los Angeles, so as to reach and properly serve a union passenger station and terminal within that portion of said city bounded by Commercial street, North Main street, Redondo street, Alhambra avenue, and the Los Angeles river, which they or any of them may construct and establish in accordance with our order herein, and (b) the extension of their respective main lines so as properly to provide for the rearrangement of passenger and freight routes incidental to the convenient and proper operation of such union passenger station and terminal.

(4) That the extensions referred to in the preceding paragraph are reasonably required in the interest of the public convenience and necessity, and that in our opinion the expense involved therein will not impair the ability of defendants to perform their respective duties to the public.

(5) That, in addition to the abandonment of service on Alameda street as above authorized, the present and future public convenience and necessity permit the abandonment by defendants of such portions of their respective main lines of steam railroad in the city of Los Angeles, or of the operation of all or any portion of the present train service thereon, as may be incidental to the rearrangement of passenger and freight routes, of tracks, and of terminal facilities, made necessary or proper in connection with the construction and establishment by defendants, in accordance with our order herein, of a union passenger station and terminal within that portion of said city described in paragraph 3 above.

(6) That the use by any defendant steam carriers of so much of the terminal main-line track or tracks of any of the other defendant steam carriers in the city of Los Angeles as may be incidental, and necessary or convenient, to the proper operation of any such union passenger station as defendants or any of them, in accordance with our order herein, may construct and establish in that portion of said city described in paragraph 3 above is in the public interest, and is practicable, without, in our opinion, impairing the ability of the carrier or carriers owning or entitled to the enjoyment of such track or tracks to handle its or their own business.

(7) That the present and future public convenience and necessity require and will require the construction by defendants, Southern Pacific Company, the Atchison, Topeka & Santa Fe Railway Company, and the Los Angeles & Salt Lake Railroad Company, and each of them, of a union passenger station within that portion of the city of Los Angeles described in paragraph 3 above, together with such tracks, connections, and all other terminal facilities and additions, improvements, or changes in the existing railroad facilities of said defendants as may be reasonably necessary, convenient, or incidental to the use of said union passenger station.

(8) That, in our opinion, an adequate union passenger station can be constructed within the said described portion of said city at a cost of approximately ten millions of dollars, in substantial compliance with the plan outlined in Commission's Ex-

hibit No. 4-b herein, which said plan is hereby found to be in all essential respects similar to that certain plan for a union passenger station in said area considered by the Interstate Commerce Commission to be in the public interest in its order and decision of July 6, 1925, in its Docket No. 14778, to which reference has been made hereinabove.

(9) That said plan for a union passenger station in said portion of said city, in our opinion, is and would be in the public interest and that its construction is practicable, without, in our opinion, impairing the ability of these carriers to perform their respective duties to the public.

(10) That said construction ought reasonably to be made. Wherefore,

It is hereby *ordered*:

(1) That the defendants, Southern Pacific Company, the Atchison, Topeka & Santa Fe Railway Company, and the Los Angeles & Salt Lake Railroad Company, and each of them, proceed to construct and thereafter operate a union passenger station within that portion of the city of Los Angeles bounded by Commercial street, North Main street, Redondo street, Alhambra avenue and the Los Angeles river, together with such tracks, connections, and all other terminal facilities and additions, extensions, improvements and changes in the existing railroad facilities of said companies as may be reasonably necessary and incidental to the use of said union passenger station, at a cost of approximately ten million dollars, in substantial compliance with the plan outlined in Commission's Exhibit 4-b herein.

(2) Work upon the construction of said union passenger station shall commence within ninety days after the effective date of this order, and shall be completed within three years after said date.

(3) Upon and after the construction of said union passenger station the operation by defendant Southern Pacific Company of passenger and freight train service, excepting only industrial freight-switching service during hours hereinafter to be prescribed by proper authority, over that portion of its railroad between College street and East Fifteenth street, inclusive, in the city of Los Angeles, shall be abandoned and discontinued.

This above order shall be and become effective from and after the promulgation by the Interstate Commerce Commission of an order issuing and granting proper and sufficient certificates or other appropriate order or orders covering and authorizing the construction, extensions, and abandonments herein authorized or directed, it being the intent of this Commission that the issuance of such certificates or other order or orders on the part of the Interstate Commerce Commission shall be and constitute a condition precedent to the effectiveness of the said order of this Commission. To which end,

It is hereby *further ordered,* that the attorney of this Commission forthwith file with the Interstate Commerce Commission a copy of this order, together with such appropriate petition or application as may be necessary in the premises, requesting and praying that the Interstate Commerce Commission issue such certificates or other appropriate order or orders as may be requisite or proper in order to render this order effective.

The Railroad Commission reserves the right to make such further order or orders in these proceedings relating to the construction, operation, modification, and abandonment of facilities, to costs and division of costs, and to all other matters relating thereto, as may be determined by the Commission to be just and reasonable and as public safety, convenience and necessity may require.

It is hereby *further ordered,* that Application No. 3346, as above entitled, be and the same is hereby dismissed.

CALIFORNIA RAILROAD COMMISSION.

RE FRESNO TRACTION COMPANY.

[Decision No. 18656, Application No. 12653.]

Valuation — When necessary — Burden of proof — Street railway.

1. The burden of proof is cast upon a utility seeking increased rates to prove a true valuation of the properties involved, p. 169.

Return — Means of securing — Increased rates — Economic detriment to service — Street railway.

2. An increase of rates will be allowed rather than a serious impairment of service by proposed operating economies in order to secure an adequate return to a street railway, p. 171.

P.U.R.1928A.

Rates — Reasonableness — Value of service — Street railway.
Discussion of deflection of patronage due to increased rates, p. 172.

[July 21, 1927.]

APPLICATION for rate increase; approved.

Appearances: Everts, Ewing, Wild and Everts, by D. S. Ewing and F. G. Everts, for applicant; Loren A. Butts, City Attorney, for city of Fresno.

Louttit, Commissioner: In this application the Fresno Traction Company states that the existing rate of fare charged on its street railway system within the city of Fresno is insufficient to pay operating expenses, taxes, and afford a reasonable return upon its capital investment, and requests that the Commission make an order increasing its rate of fare sufficiently to allow the company to earn a return of 8 per cent on the used and useful property devoted to public service in the city of Fresno.

A public hearing was held on this application at Fresno on October 25, 1926.

It appeared at the hearing that the company was operating over two lines for which no certificate of convenience and necessity had been issued by this Commission and the company was requested to make application for such a certificate. Accordingly the company filed Application No. 13371 and by the Commission's Decision No. 18065, dated March 14, 1927, certificate of convenience and necessity was issued authorizing the operation by the company of these two lines. After the issuance of this certificate the present application was submitted for consideration.

In its application and the statements attached thereto the company has given in detail a record of its revenue and expenses during the year 1925. It is alleged in the application that the present capital investment of the Fresno Traction Company is $1,328,796.27. It is set forth in the company's exhibit that the operating loss, exclusive of any return on this investment during the year 1925, for its lines in the city of Fresno amounted to $3,569.81 and by including a return on investment a deficit of $110,280 occurred.

In addition to the statement of operations for the year ending

December 31, 1925, attached to its application, the company also submitted exhibits showing its receipts and disbursements for other periods in general subsequent to December 31, 1925, and also exhibits containing the franchises under which it operates. No detail setting forth the method used in the determination of the investment amount as stated above was submitted.

The Commission's engineers made a thorough investigation of the books and records of this utility. A report on the historical valuation was prepared and presented by J. G. Hunter, while the service, operation and financial condition was shown in a report prepared by J. E. Cooper and N. A. Wood.

[1] No evidence tending to establish the reasonable investment or the present fair value of the properties of the railroad company was offered by the company. I am of the opinion that there is cast upon the utility seeking an increase of rates the burden of proving by competent evidence a true valuation of the properties involved upon which an interest return is expected.

The Commission's engineers, in their report on valuation submitted in this proceeding, made a thorough study of a valuation prepared in an earlier proceeding (Application No. 7705) (P.U.R.1925C, 566; see also P.U.R.1922E, 341) and of the additions and betterments constructed subsequent to the date of that valuation, and it appears from the evidence submitted by the Commission's engineers that the present fair value of the Fresno Traction Company's local street car system in the city of Fresno, including the lines within the 6-cent fare zone, is not less than $1,328,796.27, the amount alleged in its application in this proceeding, and it is recommended that this sum be accepted for the purposes of this proceeding as the rate base upon which shall be computed a return to the company.

The Fresno Traction Company renders both a local and interurban service. The local service consists of seven street car lines operated within the city or immediate vicinity, while the interurban service, which consists of two lines, is extended from the termini of two local lines several miles outside the city of Fresno. The basic fare on the local lines is 6 cents, while the interurban fare varies with the distance.

The Commission's engineers, in their study of operations, have

adopted a different method of apportioning revenues and expenses between the city lines and the outside lines than that used by the company. Three of the local lines which are entirely within the 6-cent fare zone operate for short distances beyond the city limits, and since the 6-cent basic fare which applicant desires to increase applies to the ends of these lines, the Commission's engineers have considered them part of the local system.

The traction company in its allocation of its revenues and expenses has used a method based on the number of car miles operated. After determining that 87.9951 per cent of the total car mileage of the system was operated within the city limits of Fresno, it has credited city operations with this percentage of the system revenue and charged city operations with a like percentage of the total operating expense. The two county lines operate through a sparsely settled territory and have but few patrons and from a table compiled from the company's records it appears that the revenue per car mile for these lines outside the city amounts to but $0.0439, while that for lines within the city amounts to $0.1674, or approximately four times as great, and that 99 per cent of the total system revenue is collected on the local lines. It, therefore, appears that the city's operation should be credited with a considerably larger proportion of the total revenue than that reflected by the company's statement.

In the apportionment of operating expenses between city and county lines, the Commission's engineers have used a formula under which the charges to the two services are distributed according to the units with which they are directly affected, for instance, maintenance of equipment is apportioned according to the number of car miles operated, while track maintenance is divided according to the number of track miles maintained.

The records show that the net revenue received from the operation of the local system for the twelve months' period ending June 30, 1926, based on the allocation made by the Commission's engineers, was $35,819.80, from which taxes amounting to $18,606.47 should be deducted, leaving a net income of $17,213.33.

The study of the Commission's engineers was extended to in-

clude operation and service rendered by this utility and in their report they have made certain recommendations with the view of effecting a saving in the cost of operation. These suggestions consist primarily of an increase in the headways of cars on certain lines during the periods of the day when travel is light and changes in the routeing on several of the lines to effect a more evenly balanced service with a reduction in the number of car miles operated. These recommendations are assembled into a general plan of rerouteing and changes in schedule and a forecast is made of the probable financial result of a year's operation under such a plan based on the assumption that no material change in revenue will result from either a change in business conditions or from a reduction in traffic because of changes in service. The net income under this plan is estimated at $49,757.

It, therefore, appears that the net income of the company, based upon the service now rendered, and the rates now in effect, amounts to $17,213.33, which amount would yield a return of 1.3 per cent on a rate base of $1,328,796.27. However, if the recommendations of the Commission's engineers are put into effect it is concluded that the company may reasonably expect a net income of $49,757. To carry out the recommendations of the Commission's engineers will involve additional expenditures in capital accounts estimated at $36,900. Adding this amount to the rate base of $1,328,796.27, previously found, results in a total of $1,365,696.27. The estimated income just stated would yield a return of 3.6 per cent on this rate base.

[2] In my opinion neither the return from the service as it now exists with a 6-cent basic fare nor the return that may be expected if the recommendations of the Commission's engineers are carried out, is reasonable and, since it appears that no further saving in operating expenses can be realized without seriously impairing the service rendered, the only means of securing an adequate return for the company on its local system is by an increase in the fare.

It is doubtful that the service changes, if carried out, will greatly affect the revenue. The suggested reduction of service during the peak periods of travel in the morning and evening from that now in effect is negligible and some additional service

is proposed during these hours. The principal reduction in service would occur during the slack periods in the middle of the day and even here the changes in headway are slight.

As to the effect an increase in fare will have on the volume of traffic, there is very little evidence in the record. Applicant introduced no direct testimony as to what, if any, deflection in travel could be expected and the only testimony in this respect is a statement of one of the Commission's engineers that there is usually some deflection due to increased rates, but that in the past where rates have been increased in this state many other factors have entered into the problem and that it has been impossible to fix any definite formula for estimating the falling off of traffic due to rate increases.

The changes in rerouteing, schedules and service proposed by the Commission's engineers appear to be satisfactory to the city of Fresno and applicant at the hearing expressed a willingness to try the new plan. It is probable that if the fares are increased, there will be, for a time at least, some small reduction in the amount of travel. No specific rate schedule is applied for in the application but I am of the opinion that if a 7-cent basic fare is charged and patrons given the privilege of purchasing tickets or tokens at the price of three for 20 cents, this company can earn a return of about 4 per cent. If, in addition, the plan of operation suggested by the Commission's engineers is put in effect, this rate of return may reasonably be expected to increase to approximately 6¼ per cent. It is, therefore, recommended that the traction company be authorized to increase the rate of fare on its local lines where a 6-cent fare is now in effect to 7 cents and required to sell tokens or tickets at the price mentioned, or three for 20 cents. The following form of order is recommended: [Order omitted.]

P.U.R.1928A.

CALIFORNIA RAILROAD COMMISSION.

BAY AND RIVER BOAT OWNERS' ASSOCIATION

v.

WILLIAM FRODSHAM.

[Decision No. 18695, Case No. 2297.]

Certificate of convenience and necessity — When certificate is required — Boats under five tons burden.

1. A passenger boat of a size under five tons net register is not a "vessel" within the meaning of, and, therefore, not subject to, the Public Utilities Act (§ 2 (y) 1915), p. 174.

Certificate of convenience and necessity — When required — Boats — Contract shipments.

2. The operation of a boat to transport various shipments at irregular intervals and under private contract will be permitted without a certificate of convenience and necessity, p. 174.

Certificate of convenience and necessity — When required — Mail boats — Auxiliary vessels.

3. The operation of a boat of a size subject to the Public Utilities Act cannot be permitted, without a certificate, to transport freight and passengers as an auxiliary service to a mail boat not subject to the act, p. 174.

[August 8, 1927.]

COMPLAINT against operation of three certain boats without certificates; operation of one boat prohibited.

Appearances: Gwyn H. Baker, for complainant; Edward J. Lynch, for defendant.

Louttit, Commissioner: The complaint of Bay and River Boat Owners' Association, filed in this matter on December 28, 1926, alleges that defendant, William Frodsham, is engaged in the operation of vessels on the inland waters of the state of California as a common carrier of freight for hire between Antioch and various points, more particularly between Antioch and Stockton; that the defendant was not operating vessels in good faith under tariffs and schedules lawfully on file with the Railroad Commission of the state of California prior to August 16, 1923, and that no certificate has ever been issued by the Railroad Commission of the state of California declaring that public convenience and necessity require such operation by the defendant, and that, therefore, such operation by him is unlawful and in violation of § 50 (*d*) of the Public Utilities Act.

In answer to the complaint the defendant denies each of the above allegations. The issues in the case are, therefore, well defined.

[1] A formal hearing in the matter was held before me at Antioch on March 15, 1927, at which time testimony was introduced by the parties. The record shows that the defendant is now operating, and since 1923 has operated, a mail boat from Antioch to certain points on the Sacramento and San Joaquin rivers under contract with the United States Government. With this boat the defendant also performs a common carrier service in the transportation of light freight and passengers. This boat —a gasoline launch—is of a size under the burden of 5 tons net register, and, therefore, is not a "vessel" within the meaning of the term as used in the Public Utilities Act (§ 2 (*y*), Public Utilities Act, 1915). The operation of this vessel, therefore, is obviously not in violation of any provision of the Public Utilities Act.

[2] The record further shows that the defendant owns a tugboat of 8 tons net register and a barge of about 80 tons net register. The tugboat is used as an auxiliary boat on the mail route service by the defendant, and occasionally as a towboat for the barge. The barge is used three or four times a year by defendant for the transportation of hay and other products between points in the vicinity of Antioch. In every instance the service performed with the barge is rendered under private contract with the shipper. The record shows that there has been no such holding out by defendant to serve the public generally with the barge as to impress upon his operations the status of a common carrier.

[3] It appears that defendant's operation of this tugboat of 8 tons net register as an auxiliary boat for the service rendered by the mail boat of less than 5 tons net register, is in violation of the Public Utilities Act, in so far as it is used in the performance of a common carrier service for the transportation of freight and passengers. The defendant, therefore, should be ordered to discontinue the use of this boat of 8 tons net register in the performance of service as a common carrier unless and until he shall have obtained a certificate and the order will so provide.

COLORADO PUBLIC UTILITIES COMMISSION.

RE O. W. TOWNSEND, Doing Business Under Name of Cornhusker Stage Lines.

[Application No. 888, Decision No. 1435.]

Monopoly and competition — Proof of inadequate service as reason for permitting.

1. Clear proof that existing service is inadequate or unsatisfactory is necessary to warrant the grant of a certificate to operate a transportation utility over a route virtually paralleling established lines, p. 177.

Certificate of convenience and necessity — Evidence of necessity — Testimony of county commissioners.

2. Testimony of county commissioners as to public convenience and necessity of a proposed transportation route, while not binding upon the Commission, is entitled to considerable weight, p. 179.

Monopoly and competition — Motor utility competition — Undermining vital utility.

3. A certificate to operate a motor utility should not be granted where the additional transportation proposed would result in the curtailment or destruction of other forms of transportation vital to the needs of the people, p. 179.

Certificate of convenience and necessity — Evidence of necessity — Interstate operation — Automobiles.

4. The fact that an applicant will eventually operate over a proposed route in interstate commerce does not of itself entitle the Commission to grant a certificate for intrastate business unless public convenience and necessity for the same were proven to the same degree required in the absence of such interstate operation, p. 180.

Monopoly and competition — Cheaper fares — Automobiles — Vital utility.

5. Guaranty of cheaper fare, while entitled to great weight is not alone sufficient to overcome the consideration of destructive competition to vital existing utilities likely to result from the grant of a certificate, p. 181.

(BOCK, Commissioner, dissents.)

[October 13, 1927.]

APPLICATION for certificate of convenience and necessity; intrastate certificate refused and interstate certificate granted.

Appearances: Harry S. Class, Denver, for applicant; J. Q. Dier, Denver, for Chicago, Burlington & Quincy Railroad Company; E. G. Knowles, Denver, for Union Pacific Railroad Company; George H. Swerer, Denver, for the Platte Valley Trans-

portation Company; D. Edgar Wilson, Denver, for the Colorado Motor Way, Inc.

By the **Commission:** On May 5, 1927, O. W. Townsend, doing business under the name and style of the Cornhusker Stage Lines, filed two applications, one for a temporary, the other for a permanent certificate authorizing the transportation of passengers by motor vehicle each way between Denver and Julesburg and intermediate points. As qualified and modified thereafter the applicant now seeks to transport passengers from Denver to Sterling and Julesburg and all points intermediate to the two latter and from Sterling and Julesburg and intermediate points to Denver.

Applicant seeks also a certificate of public convenience and necessity covering his interstate operations between Denver and the point where his line crosses the state line in northeastern Colorado.

Protests were filed by the Platte Valley Transportation Company, the Chicago, Burlington & Quincy Railroad Company, the Colorado Motor Way, Inc., Union Pacific Railroad Company and the boards of county commissioners of Weld and Morgan counties.

The applications were set down for hearing and were heard on August 16 and 17, 1927, in the court house in Sterling, at which time evidence in support of and in opposition thereto was received. The two applications were consolidated on order of the Commission.

The applicant has headquarters in Hastings, Nebraska. He has been in the motor transportation business for some four years. He has some thirty-two pieces of equipment operating over 1,012 linear miles. His daily mileage amounts to about five thousand bus miles. Seventy-six people are in his employ, thirty-two being drivers. He has a complete repair shop employing thirty-one people. He serves one hundred and twelve communities and does an extensive intrastate operation in the state of Nebraska. He carries public liability and property damage insurance and has a very complete double entry bookkeeping system of accounts showing detailed costs of operations. His net worth, according

to Exhibit G, is $135,667.77, although four years ago he was worth practically nothing. His equipment consists of twenty-five passenger Mack parlor busses which are modern with all up-to-date conveniences. Since about April 15, 1927, he has operated interstate from and to Nebraska. Exhibit E is a proposed schedule calling for two trips each way daily between Julesburg and Denver intrastate. Exhibit F is a detailed statement of costs of operation, the total of which is $.1625 per mile. He proposes to operate on a rate of 2.6 cents per mile, round trip one and one-half of regular fare, good for thirty days. The testimony shows without doubt that the applicant is operating on a most efficient and economical basis and that a certificate could not be denied him on any other ground than that public convenience and necessity does not require any such operation as is proposed.

As has been stated and heretofore clearly established, "the doctrine that certificates to operate an auto stage or freight service shall be granted or withheld upon the basis of whether the rights, welfare, and interest of the general public will be advanced by the prosecution of the enterprise and not upon the private benefit or advantage that may accrue to any carrier, shipper, or consignee." Re Motor Transit Co. P.U.R.1922D, 495, 500. As was said by the Indiana Public Service Commission in Re Newcastle Transit Co. P.U.R.1926B, 185, 189: "What the public want is impelling evidence of the public's convenience and need in transportation." In determining whether or not the welfare and interest of the general public will be advanced by the prosecution of the proposed enterprise there are several considerations which we deem controlling in this case.

[1] It has been held repeatedly "on applications for certificates of public necessity and convenience, particularly where an additional service is proposed which will virtually parallel existing carriers, that a clear and affirmative showing must be made that the existing transportation facilities are inadequate or unsatisfactory." Re Motor Transit Co. *supra,* at p. 504.

To the same effect is the language of the Arizona Corporation Commission in Re Jerome-Union Stage Line, P.U.R.1922E, 850, 852:

"The showing required of an applicant before this Commission for a certificate that the public convenience and necessity require the operation of motor vehicles for compensation over the public highways, whether for the transportation of persons or property, must be affirmative."

In support of the application herein J. A. McClary, Esq., of Sedgwick, a state representative, E. R. Kielgass of Sedgwick, formerly a newspaper editor, now engaged in the collection and reporting business, were the only two witnesses other than the applicant who testified that the public convenience and necessity requires the proposed operation. Another witness, J. H. King, Esq., of Sterling, a state senator, testified that he sells petroleum products to applicant for the use of his busses running through Sterling, and that occasionally there is a demand for local bus service. Mr. King further testified that the present train service is very good and that the people of the communities of Sterling, Sedgwick, and Julesburg have on an average almost one car to the family.

On the other hand, there were numerous witnesses (some twenty in number), residing in Fort Morgan, Julesburg, and intervening towns and cities, who testified that the public convenience and necessity does not require a motor bus operation. Among these witnesses were the mayor of Sterling, president of the chamber of commerce of Sterling, the city clerk of the city of Sterling, who presented a resolution passed by the city council of said city against the granting of the certificate, a newspaper editor of Julesburg, a newspaper editor of Ovid, a hotel proprietor of Julesburg, a banker of Julesburg, two county commissioners of Logan county and the president of the First National Bank of Fort Morgan. Moreover, the boards of county commissioners of both Morgan and Weld counties filed petitions and protests. So far, therefore, as the wishes of the people of these communities are concerned, the evidence would indicate that the overwhelming sentiment is against the granting of a certificate. The following language of the North Dakota Board of Railroad Commissioners in Re Fargo-Moorhead Trucking Co. P.U.R.1927A, 350, 359, concerning the shipping public is quite as applicable to the traveling public.

"While the testimony of the applicant seems to offer certain convenience to the shipping public, preponderance of testimony in this case shows that the shipping public is satisfied with present shipping facilities."

[2] While the Commission does not consider binding upon it the opinions of county commissioners as to whether there exists a public convenience and necessity, we do believe they are entitled to considerable weight. As is stated by the California Railroad Commission in Re Miller, P.U.R.1927A, 626, 631: "It [the policy of the board of county commissioners] is an important factor to be considered in determining whether public convenience and necessity will be subserved by authorizing the proposed service. All other things being equal, we should feel inclined to deny a certificate, upon such a showing [of opposition in such board] by the county."

[3] The communities involved are served by quite a number of trains. This is particularly true of Fort Morgan and Sterling and intervening communities which are served by the trains of both the Union Pacific and the Burlington. The evidence shows the passenger business to and from the stations on these lines has very greatly decreased in the past few years, due very largely to the use of private automobiles. The evidence shows also a strong desire on the part of the communities involved not to have their passenger service further curtailed. It is obvious that sufficient loss of passenger traffic by the railroads may properly result in further curtailment of service. The curtailment of service by these railroads would seriously affect the communities involved by eliminating the means of transporting milk, cream, and other commodities, to say nothing of passengers. The statement made by the Montana Board of Railroad Commissioners in Re Kelly, P.U.R.1927A, 832, 835, is in part applicable here.

"It would be unfair to Philipsburg residents to cloud the issue by false hopes of both train and motor vehicle service. Based on the past five years' experience this statement can, and should be, made at this time: The admission of a competitive motor carrier to the Drummond-Philipsburg branch must mean the elimination of passenger service and severe diminution of rail

freight service. The rail branch is now operated at a heavy loss; it is sustained by a great system, but total dependence on system strength is unfair to shippers who must meet the bills. As a mining and agricultural center Philipsburg is in fact vitally dependent upon continuing rail service. Based on revenues it now contributes to the branch, present service can only continue if the loss sure to be inflicted by a competitive motor vehicle carrier is avoided, and avoided now." We quote also from Maryland Public Service Commission in Re Red Star Line, P.U.R.1927B, 145, 157: "Additional transportation, which is offered now, may result in less transportation of a character that is vital to the needs of the people." The Maryland Commission in the case cited points out further that even though the rail carrier does not protest against the proposed operation of a motor bus line, it is the duty of the Commission to prevent duplication of service if it is not necessary to the public, in order to avoid giving an excuse to the rail carrier to endeavor at a later date to cut down the service it is rendering, the language of the Commission being:

"Train service is still a necessity, while, to a large extent, competitive motor bus service is a transportation luxury. The mere fact that a rail carrier does not protest against a motor bus line which parallels the rail line—in the present case no substantial protest was made by the Pennsylvania Railroad against the paralleling of its Philadelphia line in Maryland—does not relieve this Commission of the obligation of preventing such duplication of service if it is not necessary to the public. This is because no excuse should unnecessarily be given rail carriers to endeavor to cut down the service they are now rendering." (*Supra,* at p. 158.)

[4] The argument is made that the applicant will in any event operate over the roads in interstate commerce and that the state should derive some revenue from his operation by allowing him to carry passengers intrastate. The Maryland Commission in the case cited meets the argument with the following statement:

"It seems to the Commission that the test should be embodied in a formula something like this:

"If the interstate line asking for intrastate privileges on routes over which it is operating, were not in existence, would such privileges be granted by the Commission to an intrastate line, entirely within the Commission's jurisdiction, on the ground that the granting of them is necessary to the public welfare and convenience?" (*Supra*, at p. 162.)

The Commission then concludes:

"There being sufficient service along that road now to meet the requirements of the people the Commission is of the opinion that the public welfare and convenience do not require the granting of the permits applied for. Such privileges as are asked would not at this time be granted to a purely intrastate line." (*Supra*, at p. 163.)

[5] The most important reason—not to say the only one of consequence—for granting the certificate to the applicant is that he offers to render service at one cent a mile less than the rates of the railroads and to sell round trip tickets good for thirty days at one and one half times the one-way fare. While this is a matter that is entitled to serious consideration and great weight, we have concluded that the fact alone is not sufficient to overcome the other considerations found in the case. If the rates were higher than those of the railroads, it might well be argued that there could be no danger of the applicant securing enough business to result in a curtailment of rail service. In Re International Bus Corp. P.U.R.1927A, 346, 349, in granting a certificate authorizing a motor bus operation, the New York Public Service Commission laid stress on the fact that the rates of fare of the bus operator would be higher. The Commission said: "With respect to the other railroads it is thought, in view of the nature of the service, involving as it does much higher rates of fare and longer running time, no substantial competition will be felt."

Another consideration is that there is now in operation between Sterling and Greeley a motor bus system, and another

between Greeley and Denver, the latter making frequent trips each way daily.

The Commission, therefore, concludes for the reasons stated, that the public convenience and necessity does not require the issuance of the certificate authorizing the operation by the applicant of a motor vehicle system for the transportation of passengers intrastate.

In reaching this conclusion the Commission is quite mindful of the fact that it should not attempt to put motor vehicle transportation in a straight jacket, and that when the showing justifies and the public convenience and necessity really requires the issuance of a certificate, taking into consideration the rates of fare, the greater convenience, the need for and effect upon existing service, and the inability or failure, if it exists, of the railroad companies to meet the competition of this new form of transportation, then the Commission will have open no other course than to grant the certificate.

As to the interstate operation, the Commission has no ground for its denial. It must under the statute (House Bill No. 430) and its decisions issue it.

Bock, Commissioner, dissenting: I regret exceedingly that I am unable to concur with my colleagues in the disposition of this application. The applicant proposes to transport by motor vehicle passengers in intrastate between Julesburg and Sterling and intermediate points and from Sterling and Fort Morgan and return, but not to intermediate points on a rate of 2.6 cents per mile, round trip one and one-half of regular fare, good for thirty days. This is substantially less than the rates charged by the railroad carrier. In my opinion the public is entitled to transportation at the lowest rate consistent with proper service. A substantially cheaper transportation service, when based upon sound economic principles and on which there can be realized a fair return to the carrier, is a public convenience and necessity. The cost of operation by the applicant is 16.25 cents per mile. This is a very low cost as compared to operations by rail carriers.

In this connection, I desire to call attention to an address made by Hon. A. G. Patterson, Chairman of the Alabama Public Service Commission, to the National Association of Railroad and Utilities Commissioners at Asheville, North Carolina, on November 9, 1926, in which, referring to the economics of motor vehicle carrier transportation, he stated:

". . . If with improved systems of highways, the motor bus and the motor truck can furnish to the people a more convenient, efficient, and economical method of transportation, the people should not be denied the benefits thereof because the granting of franchises and certificates to such motor vehicle carriers to carry on business will necessarily result in some loss to the rail carriers. . . . If such motor vehicle transportation can be carried on for the people at a lower cost than rail transportation, and the difference in cost is sufficient to warrant consideration, then we think that alone might justify the granting of a certificate to a motor vehicle carrier, even if the rail carrier traversing the territory served was already in a position to carry all the persons and goods offered to it but for the rendition of such service demanded a substantially higher reward. . . . The people are entitled to the benefits that will accrue from improved highways and the development of the motor vehicle just the same as they are entitled to the benefits accruing out of the advancement of science in any other field. . . . The man is foolish who holds to the view that regulation should ever be exercised in such way as to deprive the people of any better, more convenient or more economical method of carrying on their affairs." (38 Ann. Proc. Nat. Asso. R. & Util. Comrs. 12, 13.)

Furthermore, the president of one of the largest railroads of our country is reported to have said recently that, all things considered, the most economic transportation is the most desirable, and if the railroads cannot provide it, so much the worse for the railroads.

Because of the low cost of operation, I am of the opinion that a temporary certificate for a period of six months should be granted to the applicant for the purpose of more definitely ascertaining whether this cost includes all charges of operation

and if so, whether such operation can be successfully and economically conducted on the rates proposed. Incidentally this would also determine whether the public would travel on the proposed system. The auditor of the Commission could personally examine the accounts of the applicant during the six months period and thereafter a further hearing could determine whether, under all the facts and circumstances, a permanent certificate of public convenience and necessity should issue. If the proposed intrastate operation, after such an investigation, is economically sound upon the rates as proposed by the applicant, he should be issued a certificate of public convenience and necessity conditioned that he will maintain the passenger fare suggested.

COLORADO PUBLIC UTILITIES COMMISSION.

RE ALICE JAMES LILLEY.

[Application No. 922, Decision No. 1438.]

Certificate of convenience and necessity — Evidence of necessity — Consideration of entire operation.

1. In determining whether or not public convenience and necessity requires the operation by any applicant, due consideration should be given to the question of whether or not the operation as a whole can be made to pay, p. 186.

Certificate of convenience and necessity — Evidence of necessity — Superiority of mode of travel — Automobiles.

2. The superiority of the mode of transportation under local conditions as well as the fact that private carriers would secure the business solicited if no certificate were issued, were factors considered in an application by a motor carrier, p. 186.

[October 13, 1927.]

APPLICATION for certificate of convenience and necessity; approved.

Appearances: Flor Ashbaugh, Littleton, for applicant; Thomas R. Woodrow, Denver, for the Denver & Rio Grande West-

ern Railroad Company; Erl H. Ellis, Denver, for the Atchison, Topeka & Santa Fe Railway Company; J. L. Rice, Denver, for the Colorado & Southern Railway Company.

By the **Commission:** On June 10, 1927, there was filed an application of Alice James Lilley, in which she prays for a certificate of public convenience and necessity authorizing the operation of a motor vehicle system for the transportation of milk and dairy products from the vicinity of Littleton, Colorado, to Denver, Colorado, and to transport to and from Denver and Littleton and vicinity other commodities. Protests were filed by the Denver & Rio Grande Western Railroad Company, the Atchison, Topeka & Santa Fe Railway Company, and the Colorado & Southern Railway Company.

The application was set down for hearing and was heard in the hearing room of the Commission in Denver on October 3, 1927, at which time evidence in support of and in opposition thereto was received. The testimony shows that the applicant has been transporting by motor truck milk and cream from the vicinity of Littleton to Denver since about the year 1915. It shows further that shortly thereafter she began transporting from Denver to Littleton fresh vegetables, fruits, meats, drugs, ice cream, small repairs for machinery and heating plants and ice cream from Denver to Littleton, and repairs for machinery and dairy equipment from Denver to farmers in the Littleton district. There was evidence that on rare occasions the applicant had hauled some ground feed to the farmers, but the extent of this business was so small as to be of no consequence.

The applicant is a woman of strong financial standing, and is assisted in the operation of her business by her son-in-law. Her equipment consists of one service truck of the value of $3,250, and one Ford truck of the value of $400.

There was some question raised by the opposition as to whether or not, when proper allowance is made for all expense of operation, including depreciation, the applicant is really making a profit. If the public convenience and necessity requires such operations as she is conducting, and the volume of business is

great enough, the operation can properly be made to pay if it is not so doing at this time.

[1] There was made also a point to the effect that the volume of the business done by the applicant, other than the milk and cream business, is so small that alone it would not pay and that, as we understand the contention, therefore, the public convenience and necessity does not require the applicant to transport anything else other than milk and cream. The Commission is of the opinion, that in determining whether or not the public convenience and necessity requires the operation by any applicant, due consideration should be given to the question of whether or not the operation as a whole can be made to pay. On the other hand, if it appears that there is a real public need for the transportation of certain goods along with a large volume of another commodity, the fact that it would not be profitable to transport those goods alone is of no importance.

[2] The evidence shows that occasionally the merchants of Littleton have occasion to return merchandise received by them which either was not ordered or if ordered is unsatisfactory, and that the service of the applicant in returning such merchandise is cheaper and much more convenient than that rendered by the railroads.

The evidence shows that as to milk and cream, repair parts for machinery and heating plants, and the perishable commodities such as fresh fruits, vegetables, fresh meats, ice cream, and drugs, the service rendered by the applicant is much more expeditious, and, therefore, much superior so far as the preservation of most of the commodities hauled is concerned. It shows also that these things would move by private carriers if no certificate of convenience and necessity is issued.

After consideration of all the evidence introduced in the case, the Commission is of the opinion, and so finds, that the public convenience and necessity does now and in the future will require the operation of a motor vehicle system for the transportation by the applicant of milk and cream from the vicinity of Littleton to Denver, and of merchandise returned by the merchants in Littleton to wholesale and jobbing houses in Denver,

and for the transportation from Denver to Littleton of perishable vegetables, fresh fruits, meats, ice cream, drugs, and repairs for heating plants and machinery, but not for any other commodities, and from Denver to Littleton farmers in the vicinity of Littleton of repairs for machinery, but not for the transportation of any other commodities.

NEW YORK DEPARTMENT OF PUBLIC SERVICE, STATE DIVISION.
PUBLIC SERVICE COMMISSION.

RE ROBERT TOSTANOSKI, Doing Business as Yonkers Bus Service.

[Case No. 3940.]

Certificates of convenience and necessity — Power of Commission to divide route.

The Commission has no power to divide a route solicited in an application for a certificate of convenience and necessity when it appears that only part of the route is publicly necessary, and it will dismiss the application without prejudice to the applicant to renew his petition for that portion of the route which has been proven necessary.

[August 4, 1927.]

APPLICATION for certificate of public convenience; application refused without prejudice.

Appearances: Irvin E. Klein, Yonkers, appearing for the petitioner; Alfred T. Davison, Addison B. Scoville, and Victor McQuistion, appearing for the Yonkers Railroad Company, New York city; A. C. Hume, and Richard E. Fitzgibbons, Corporation Counsel for city of Yonkers, Yonkers.

Van Namee, Commissioner:

General Statement:

The city of Yonkers, under the provision of § 37 of the Second Class Cities' Law, advertised the sale by public auction of 15 proposed bus routes within said city and the local franchises for the same were auctioned and awarded separately to the highest

bidder on February 16, 1927. Of the 15 routes offered, 14 were awarded to the Merchants Community Bus Transit, Inc., and one to Robert Tostanoski doing business under the firm name and style of the Yonkers Bus Service. The other 14 applications were considered in Case No. 3937, the memorandum in which is filed coincidentally with the memorandum in the present case. Hearings in this matter were held before me in Yonkers and at the New York office of the Commission, beginning March 28, 1927, and ending June 15, 1927. A personal inspection of the proposed route was made by the sitting Commissioner.

Local Consent:

The only local consent needed in this matter is that of the city of Yonkers as all of the route in question is entirely within the limits of said city.

A copy of the contract under which the franchise was awarded to the petitioner, certified by the county clerk on the 18th day of February, 1927, was admitted in evidence at the hearing. Under the terms of the contract the petitioner agrees to pay to the city 21.8 per cent of its gross receipts per annum.

General Considerations Affecting Transportation in the City of Yonkers:

This route is parallel with Routes Nos. 8, 11, and 13, considered in detail in the memorandum accompanying Case No. 3937. In general, the considerations which govern these routes, affect Route No. 10 also. Reference is made to the memorandum filed in said case for a discussion of the present street railway lines in Yonkers and the local topographical situation which results in a division of the city into an eastern and western section. The routes above mentioned together with Route No. 10 are lines designated to connect the eastern and western parts of the city.

Discussion of the Law Governing Certificates of Convenience and Necessity:

For a discussion of the principles governing the decision in this matter, reference is had to the memorandum in Case No. 3937 under this head.

Transfers and Street Congestion:

The discussion of this subject in a similar paragraph in the memorandum in Case No. 3937, and the discussion of the subject in paragraphs under Routes Nos. 6 and 9 apply also to the present application. Reference is made to such paragraphs.

The applicant for Route No. 10, not operating any other bus route in the city of Yonkers, the provisions as to transfer would not apply, and, therefore, no transfers, without the payment of a full fare, would be available in transferring from Route No. 4 or No. 3 which cross Route No. 10 at right angles. The result would be that for a ride from any part of Route No. 3 or Route No. 4 over Route No. 10 to Getty square a fare of 15 cents would be charged.

Route No. 10—Beginning at the intersection of Palmer avenue and the east line of the city of Yonkers; thence along Palmer avenue to Fortfield avenue, to Stone avenue, to Lockwood avenue, to Saw Mill river road, to Ashburton avenue, to Palisade avenue, to New School street, to Nepperhan avenue, to South Broadway; thence returning from Nepperhan avenue and South Broadway to Getty square, to New Main street, to Nepperhan avenue, to New School street, to Palisade avenue; thence returning via the same route to the place of beginning.

This route is 4.6 miles long (Exhibit 72). From the east side of the city, the route traverses Palmer avenue on a level nearing the Bryn Mawr station where it ascends a steep hill. In the vicinity of the station, the street is level. This section is one of the highest in the city of Yonkers. Continuing along Stone street to Lockwood avenue, the route descends a steep hill, the grade varying from 6 to 8.2 per cent. This section of the route is something over two miles long. On reaching the juncture of Lockwood avenue and Saw Mill river road, the route runs along the Saw Mill river road, on which the Yonkers street car line operates its Tuckahoe branch, a distance of 4035 feet, and thence through various streets to the center of the city.

In this section, the route extends over streets on which there are existing street car lines as follows:

On the Saw Mill river road—from Lockwood avenue to Ashburton avenue	4,035 feet
On Ashburton avenue—from Park to Palisade avenue	300 feet
On Palisade avenue—from Ashburton avenue to Elm street	1,870 feet
On Nepperhan avenue—from School street to New Main street	380 feet
From New Main street to South Broadway	800 feet
A total of	7,385 feet

This is approximately 7385 feet of the western half of the route of 12,144 feet, along streets on which street cars are at present operating.

The line is divided into 2 fare zones. From the eastern line of the city to the juncture of Lockwood avenue and Saw Mill river road, 5 cents and from this point to South Broadway, 5 cents, the effect of this division being that from the juncture of Lockwood avenue and Saw Mill river road, this route competes with the Yonkers street car line over streets operated by such line for the same fare. This results in a direct competition. During the year 1926, the Tuckahoe line carried 2,202,033, an average of 6032 passengers per day. The line operated at a loss of over $18,000 and during that year its revenue was only $614 more than bare operating expenses. Reference is had to the memorandum in Case No. 3937 under Route No. 6 and Route No. 9 for the principles governing the decision in this matter. If this application is granted, allowing operation paralleling the street railroad, it would naturally follow that the application in Case No. 3937 for Routes Nos. 9 and 14, which operate on the same section of Saw Mill river road as Route No. 10, would have to be granted. That section of the route, however, lying east of the juncture of Lockwood avenue and Saw Mill river road is at present without public transportation, except that furnished by this applicant and several others who now operate bus lines under the so called emergency licenses granted by the city. These must cease operation upon the granting of a lawful certificate. The section is rapidly growing and is difficult of access. Some means of public transportation should be provided. As we have not the authority to divide this route we are compelled to deny the application without prejudice, however, to a certificate of convenience and necessity, for the operation of an auto bus line over

that portion of the route which lies east of the juncture of Lockwood avenue and Saw Mill river road.

Operation, Rates of Fare and Equipment:

The rate of fare set forth under the local franchise is 10 cents for a through ride with 2-fare zones of 5 cents each beginning east and west of the juncture of Lockwood avenue and Saw Mill river road. The applicant proposes to run 6 busses on this route and to supply more as the demand increases. The schedule he is to maintain is a 15-minute headway with a 7-minute headway through rush hours.

Financial—A Prospect of Return Under Proposed Operation:

On the basis of a 15-minute headway, 249,616 bus-miles will be operated each year, or 20,520 miles per month. The applicant estimates his gross revenue as $200 a day, or $6,000 per month. On the basis of 20,520 bus-miles per month, a total operating expense of $2,930 per month, the applicant's estimate would be equivalent to 14 cents per bus-mile.

In Case No. 3563, Buffalo-Akron Transit Co. the estimates were 25 cents per mile. Other experts have placed such costs at 30 to 35 cents per mile. In Case No. 3940, the companion case, Mr. Brister, who testified for the applicant, said that 28 cents per bus-mile was economical operation. Exhibits 62 and 63 in that case show the actual expenses of the Yonkers Railroad Company for operating busses in the city of Yonkers to be 34 cents per bus-mile. Depreciation was figured at the rate of 20 per cent. On the basis of 28 cents per bus-mile and adding in the amount which must be paid to the city of Yonkers under the agreement the operating deficit per month would be $1020.60.

It is doubtful whether any line could be operated at a profit in the city of Yonkers, which paid 21.8 per cent of its gross receipts to the city for the privilege of obtaining the local consent. However, this application is not to be denied upon financial grounds and it is probable that with a reasonable percentage paid to the city of Yonkers, the eastern half of this route which is recommended for operation, could be operated profitably.

Financial Ability of Applicant:

The applicant is only required to satisfy the Commission that he has sufficient financial ability to reasonably carry on the operation proposed. Evidence was introduced to show that the applicant owns five of the busses which he is now operating; that he has deposited $5,000 in cash with the city of Yonkers and that he has on deposit in various banks, the sum of $7,615; also that he owns real estate in the city of New Rochelle. Further, it was testified that the Yonkers National Bank & Trust Company would finance him to a reasonable extent. I consider that the applicant has presented testimony on which the Commission can hold that he is financially able to operate Route No. 10 if the same should be granted to him, or a portion of the route suggested in this memorandum.

Conclusion.

Public convenience and necessity have been shown to require the operation of the eastern half of this route extending from the juncture of Saw Mill river road and Lockwood avenue, but not to require its operation on the other or western half of said route extending from that point to South Broadway. We find that we have no authority to grant a certificate for a portion of the route and, therefore, the petition will be denied without prejudice to an application for a certificate of convenience and necessity for the operation of an auto bus route over that portion of the route which extends easterly from the juncture of Saw Mill river road and Lockwood avenue.

All concur.

P.U.R.1928A.

MISSOURI PUBLIC SERVICE COMMISSION.

RE PURPLE SWAN SAFETY COACH LINES, INCORPORATED.

[Case No. 5294.]

Certificates of convenience and necessity — Operation in good faith prior to regulation — Motor busses.

1. The Commission must indulge the presumption that motor bus service rendered in good faith previous to a Regulation Act (1927) is necessary to public convenience, and, if the applicant is otherwise qualified, must grant it a certificate of convenience in the absence of positive proof rebutting this presumption, p. 198.

Monopoly and competition — Effect of motor transportation upon railroads.

2. Lacking figures to show the relative proportion of lost railroad patronage due to private automobiles in comparison with motor busses, the Commission recognized the impossibility of a return to conditions existing before the advent of roads, automobiles, and busses, and dealt with the competitive situation between railroads and busses as a permanent one, p. 199.

Certificates of convenience and necessity — Evidence of necessity — Distinct demand — Busses.

3. Legitimate development in a short period of a motor bus utility to large proportions, in the face of unusually keen competition, indicates the necessity for such service and that it is meeting the demand for a different mode of transportation, p. 200.

Monopoly and competition — Jurisdiction of Commission — Existing carriers.

4. The Commission is not prevented from issuing a certificate of convenience and necessity to a bus utility by reason of the fact that a rail service exists, because of a statutory provision requiring the Commission "to give reasonable consideration to the transportation service being furnished by any railroad, street railway, etc." (§ 4, Missouri Laws 1927), p. 200.

Monopoly and competition — Reasons for denying certificate — Effect on other carriers.

5. A certificate of convenience and necessity should be denied if the operation of the applicant would have such effect on other carriers, rail and motor, as to be detrimental to the interest of the public, giving due consideration to the entire transportation situation in the territory affected, p. 200.

Rates — Change of rates — Rate wars — Busses.

6. All patrons of motor busses are entitled to the same rate of fare between given points and the Commission will expect applicants for certificates to refrain from competitive rate cutting or unauthorized schedule variation, p. 201.

Certificates of convenience and necessity — Consent of other governmental bodies — Busses.

7. The granting or refusing of a certificate of convenience and necessity by the Public Service Commission does not take away any existing right of municipalities to control the use of their streets, p. 201.

Certificates of convenience and necessity — Jurisdiction of Commission — As to motor bus operation.

8. The refusal of a city, town, or village along a route to grant a motor bus operator the right to use its streets does not deprive the Public Service Commission of the right to grant a certificate of convenience and necessity, p. 201.

[September 20, 1927.]

APPLICATION of a motor utility for certificate of convenience and necessity; certificate granted.

Statement.

Ing, Commissioner: On July 7, 1927, the Purple Swan Safety Coach Lines, Inc., filed with this Commission an application for a certificate of convenience and necessity to operate as a motor carrier between the cities of St. Louis and Kansas City, Missouri. The application is in due form and complies with the requirements of the Motor Bus Law and of the rules and regulations of the Commission. The applicant proposes to put in operation sixteen 30-passenger Fageol, 1926 model, motor busses. Answers and protests were filed by the Chicago, Rock Island & Pacific Railway Company; William W. Wheelock and William J. Beard, receivers of the Chicago & Alton Railway Company; Yelloway, Incorporated, a motor bus company operating between said cities; the city of St. Louis and the city of Kansas City, Missouri; the Missouri Transit Company, Inc.; M. C. Foster, the owner and operator of M. C. Foster's Troy-St. Louis Bus Line; Wabash Railway Company, and the Missouri Pacific Railroad Company. All of the protestants, except the cities of St. Louis and Kansas City, are engaged in the transportation of persons for hire between the points or along the line served by the applicant.

Without going into details the general grounds of protest by all protesting railroad companies is that the railroads now furnish adequate, sufficient, dependable, and satisfactory transportation facilities for carriage by rail of passengers, baggage, mail,

and express between the points or along the route designated in the application filed herein; that the granting of a certificate of convenience and necessity to the applicant will result in diverting from said railroads a great number of passengers and thereby burden said railroads in their efforts to continue the operation of their trains; that the service of the applicant is not necessary for serving the public convenience and necessity, but that same is already efficiently and adequately served by the steam railroads; that the only reason the applicant can hope to compete with the existing railroad carriers is because it proposes to charge fares which are unreasonably low and inadequate, and that said charges and fares, if permitted, would create undue and unreasonable discrimination and unfair competition which would result disastrously to the steam railroad carriers.

The cities of St. Louis and Kansas City allege in their answers that the applicant has not complied with the laws of Missouri, 1927, as provided in § 1, by filing in the office of the Commission evidence that the applicant has received the consent, or a franchise or permit of the city for the operation of its motor busses within the city limits, and also call attention to § 2, page 404, of Laws of Missouri, 1927, as follows:

"No provision of this act shall be so construed as to deprive any municipality within this state of its right to control the use of its streets or of the right to regulate all busses operating within its corporate limits."

In addition to the protestants hereinbefore mentioned, there appeared by counsel at the hearing the following: The Southwest Passenger Association of St. Louis, Missouri; the Missouri, Kansas & Texas Railroad Company; and the Midwest Transit Company.

This case was heard by the Commission at its hearing room in Jefferson City, Missouri, on July 21, 1927.

The Facts.

The applicant began the operation of its motor bus line over U. S. Highway No. 40 between St. Louis and Kansas City on the 4th day of June, 1926, by placing two busses in operation. It continued the operation and increased the number of busses

until at the time of the hearing in this cause there were twelve busses in operation on its lines herein referred to, ten for through service between St. Louis and Kansas City, and two from Columbia to St. Louis and from Columbia to Kansas City. In addition to the twelve busses in regular operation, the applicant has five extra motor coaches which it maintains as surplus equipment to take care of emergencies. The applicant maintains a garage at St. Louis and one at Kansas City, and is prepared for repairing and keeping in good condition the busses used in its service.

The applicant carries liability insurance on its motor busses in the maximum sum of $25,000 for injury to one person, and $100,000 for any one accident, and the maximum of $1,000 for property damage.

The testimony showed that the applicant has no franchise or permit to operate over the streets of Kansas City and St. Louis, and there was no testimony to show that it has such authority from any other municipality through which it operates or that it pays any license to any municipality.

In addition to the line between St. Louis and Kansas City the applicant operates a line from St. Louis to Farmington and lines to Chicago, Centralia, and Nashville, Illinois. Witnesses from Boonville, Columbia, and Fulton testified that the applicant is rendering a necessary, satisfactory, and dependable service. A certificate of C. W. Brown, assistant chief engineer of the Missouri State Highway Commission, showing the mileage of the counties through which said bus line passes, was filed with the Commission. This certificate shows the mileage in the county of St. Louis to be 13.3 miles; St. Charles 27.22 miles; Warren 17.25 miles; Montgomery 22.09 miles; Callaway 32.3 miles; Boone 25.1 miles; Cooper 18.67 miles; Howard 12.26 miles; Saline 24.47 miles; Lafayette 32.52 miles, and Jackson 22.21 miles. The certificate of the traffic engineer of the city of St. Louis was filed with the Commission and shows that the mileage of applicant within the city limits of that city is as follows:

Westbound to Kansas City	8 miles
Southbound to Farmington	8 miles
Eastbound to Chicago, Centralia, etc.	1 mile

A certificate of the city engineer of the city of St. Charles was filed with the Commission and shows that the mileage of the applicant in that city is 1.43 miles. A certificate of the mayor of Wentzville was filed which shows the mileage of that city to be .28 miles. The city engineer of Fulton certified the mileage of that city to be 1.83 miles; the city engineer of Columbia 2.45 miles; city engineer at Boonville 1.7 miles, and the office engineer of Kansas City 9.60 miles.

The testimony shows that the Yelloway, Inc., a motor bus company engaged in interstate business, has been giving motor service between St. Louis and Kansas City since October 14, 1924; that M. C. Foster of Troy, Missouri, has been operating a bus line from Troy to St. Louis since March 18, 1926, and a line from Troy to St. Charles, Missouri, since May 25, 1925; that the Missouri Transit Company has been operating a bus line between Boonville and Columbia, Missouri, since September 5, 1925, over Highway No. 40.

Mr. L. A. Blatterman, general passenger agent of the Wabash Railway Company, stated that the Wabash Railway Company maintains and has for many years maintained passenger service between Kansas City and St. Louis, between Kansas City and Columbia, and between St. Louis and Columbia, and that passenger service is now and has for many years been maintained between St. Louis and Kansas City by the Rock Island Railroad Company, the Chicago & Alton Railroad Company, the Missouri Pacific Railroad Company, and the Chicago, Burlington & Quincy Railroad Company. The Wabash Railway Company operates four trains daily in each direction between St. Louis and Kansas City, the Missouri Pacific operates five trains daily in each direction between the same points, and the Rock Island, the Chicago & Alton, and the Burlington operate two trains daily in each direction between the same points. Mr. Blatterman gave it as his opinion that these trains afford reasonable and adequate facilities for any and all passenger traffic that is available between St. Louis and Kansas City. The testimony of Mr. Blatterman was to the effect that there had been a considerable decrease in passengers and passenger revenue received by the Wabash Railroad Company in 1926, as compared with 1923,

which decrease was attributed by Mr. Blatterman to the operation of busses and automobiles. The witness, however, was unable to say what per cent of such loss was caused by busses and what per cent by automobiles. The decrease in passengers in the state of Missouri in the year 1926 as compared with the year 1923 was estimated at 23 per cent. The decrease in passenger revenue in the state of Missouri for the year 1926 as compared with the year 1923 was estimated at 18 per cent. The estimated decrease in passenger revenue between Kansas City and Columbia for the first five months of 1927 as compared with a like period in 1924 was 66 per cent, and between St. Louis and Columbia the decrease in passenger revenue for the same period was estimated at 32 per cent. U. S. Highway No. 40 parallels the Wabash Railroad from St. Louis to New Florence a distance of about 75 miles, and Mr. Blatterman stated that since the construction of Highway No. 40 their local passenger business between said points had so nearly disappeared that only about 25 per cent of it now remains.

Hon. Julius T. Muench, city counselor, of the city of St. Louis, stated the position of that city as follows:

"The city of St. Louis has no objection to any of these bus lines coming into the city, provided only that we retain jurisdiction over the use of the streets, and retain the right to tax a reasonable amount for the use of the streets, or so much as used and occupied either over the particular streets that the busses use and the termini they are to use, and the right to change from time to time which we think are matters for our local regulations, and we would not want to see anything done or an order made to deprive us of these rights, and further than that we have no interest in the situation."

Conclusions:

[1] In determining whether a certificate of convenience and necessity shall be granted a motor bus operator, the Commission must consider the law and the facts of each particular case. The Motor Bus Regulation Act passed by the legislature of 1927 provides as follows:

"Every motor carrier actually operating in good faith, render-

ing satisfactory and dependable service by motor vehicles that come under the provisions of this act on the 1st day of December, 1926, shall be presumed to be necessary to public convenience and such motor carriers shall in the absence of evidence overcoming such presumption receive a certificate for routes established by them."

In this case the applicant was rendering satisfactory and dependable service on and prior to December 1, 1926; therefore, in the absence of testimony to the contrary, the Commission must indulge the presumption that the service rendered is necessary to public convenience, and, if the applicant is otherwise qualified and has complied with the laws, the Commission would be compelled to grant a certificate of convenience and necessity for its continued operation over the route established by it. The railroads and motor bus operators who are protestants in this case take the position that the service rendered by the applicant is not necessary; that adequate service was being rendered by them at the time applicant began operations and that they are now prepared and are offering to give adequate passenger transportation service in the territory served by applicant, and that applicant's service is and will be unduly and unjustly competitive.

[2] That the coming of good roads, automobiles, and busses have caused a decrease in the volume of local passenger business formerly enjoyed by the railroads and a reduction in the revenue received by them from such business, there can be no doubt. Just what part busses have played in producing this condition, the evidence in this case does not disclose. It is common knowledge, however, that the number of busses used on the public highways is very small as compared to the number of private automobiles, and it is safe to say that the per cent of loss in local passenger traffic caused by the operation of busses is small as compared to that caused by privately owned and operated automobiles. Whatever the exact figures may be in that regard, the fact remains that the railroads are operating under changed conditions, conditions produced by the growth and development of the country, and which are apparently here to stay. Since there appears to be no possibility of a return to the conditions existing before the advent of good roads, automobiles, and busses the

existing conditions must be regarded as permanent, and must be dealt with as such.

[3] The fact that the applicant since the fourth day of June, 1926, has built up a bus business of its present proportions, in the face of the existing competition, indicates that there was and is a necessity for such service. The service rendered is meeting the demand of the public for a different mode of transportation, and while it may be true that the railroads are affording adequate railroad transportation, the Commission cannot on the showing made in this case say that the legal presumption of public necessity for motor bus transportation has been overcome.

[4] Section 4, page 405, Session Laws of Missouri, 1927, provides:

"In determining whether or not a certificate of convenience and necessity should be issued, the Commission shall give reasonable consideration to the transportation service being furnished by any railroad, street railway or motor carrier, and shall give due consideration to the likelihood of the proposed service being permanent and continuous throughout twelve months of the year and the effect which such proposed transportation service may have upon other forms of transportation service."

The Commission does not understand that this provision prohibits the issuance of a certificate of convenience and necessity because of the fact that rail service is already in existence. If the legislature had so intended, it could have employed language that would unmistakably convey such intention. It was well aware of the fact that there was motor bus transportation in operation throughout the state and, knowing this fact, it passed a law "providing for the supervision, regulation, and conduct of transportation of persons for hire over the public highways of the state of Missouri by motor vehicles; conferring jurisdiction upon the Public Service Commission to license and regulate such transportation."

[5] The statute above quoted requires that consideration must be given to the transportation service being furnished by railroad, street railway, or motor carrier, and it is our understanding that if the operation of applicant should have such effect upon the other carriers, rail and motor, as to be detrimental to the inter-

ests of the public, the certificate of convenience and necessity should be denied. It is the duty of the Commission to give due consideration to the entire transportation situation in the territory affected, and make a determination as to what will be for the best interests of the public, bearing in mind the fact that railroad transportation is essential and necessary to the public at large.

The applicant offered exhibits as to its financial condition, from which exhibits the Commission finds that the value of applicant's property over and above its liabilities, and without consideration of the figures given by applicant for development and expansion, and good-will and franchises, is approximately $173,000. In view of the financial showing made by applicant, and in view of the fact that applicant has been rendering satisfactory and dependable motor bus service since June, 1926, the Commission is of the opinion that the applicant is financially able to continue the operation of said motor bus line.

There was no showing that the time schedule or rates of fare proposed by the applicant are unreasonable, unjust, and improper. If it should appear, however, that such is the case, the Commission can at any time upon proper showing make such adjustment as to schedule of time or rates of fare as may seem right and proper.

[6] From the testimony in this case and Case No. 5317 (P.U.R.1928A, 217), the application of the YellowaY, Inc., to operate as a motor carrier between St. Louis and Kansas City, the Commission has learned that the applicant, and other motor carriers have been indulging in practices that cannot be tolerated by this Commission. The facts developed as to what is termed by them a "rate war," shows that the fare between St. Louis and Kansas City was reduced to a point where it would be impossible to operate if continued for many days. All patrons of motor busses are entitled to the same rate of fare between given points and this Commission will expect the applicant, and all other motor operators within the state, to refrain from competitive rate cutting, and will expect them to charge only the rates of fare allowed and authorized by the Commission.

[7, 8] This Commission has neither the power nor the incli-

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nation to deprive the cities of St. Louis and Kansas City, or any other municipality of the state, of the rights or privileges guaranteed to them by the Constitution and laws of the state. It is the duty of the Public Service Commission to grant or refuse certificates of convenience and necessity for motor bus operators, as we may find the facts and the law warrant, but in so doing we would not take away any existing right of municipalities within the state to control the use of their streets. The applicant in this case has been using the streets of St. Louis and Kansas City since it began operations in June, 1926, presumably with the knowledge, if not with the consent, of said cities. Just what action may be taken by said cities with reference to the continued use of their streets by the applicant is yet to be determined. We cannot believe, however, that the legislature intended to deprive the Public Service Commission of the right to grant a certificate of convenience and necessity to a motor bus operator, if the law and the facts warranted it in so doing, merely because some city, town, or village through which it passes would refuse to grant the motor bus operator the right to use its streets.

After a careful consideration of all the evidence introduced in this cause, the Commission is of the opinion that public convenience and necessity require that the applicant continue the motor bus operations now being engaged in by it over the route described in the application herein, and that the time schedule and rates of fare, as shown by the application and exhibits filed, should be allowed. An order in accordance with the views herein expressed will be issued.

Brown, Chairman, Ing, Calfee, and Porter, Commissioners, concur, Hutchison, Commissioner, absent.

MISSOURI PUBLIC SERVICE COMMISSION.

RE UNITED RAILWAYS COMPANY OF ST. LOUIS.

[Case No. 5370.]

Security issues — Reorganization plan — Failure to make formal request — Substantial provision — Street railways.

1. A plan for reorganization of the traction system of a large

city, approved by a large percentage of interested parties, was held to be complete and ready for Commission approval in that, while no request was made for the authorization of securities to provide for an existing cash deficit and the expense of reorganization, it did specifically provide for the manner in which such necessities might be financed, p. 213.

Security issues — Power to Commission to refuse final approval — Reorganization plan.

2. Approval of the financial methods proposed in the reorganization plan of a large traction utility does not bind the Commission to approve subsequent formal requests for authorization of security issues therein contemplated, p. 214.

Valuation — Ascertainment for security issues — Rate making — Operating property.

3. While the procedure of valuing only operating property of a utility is proper in rate cases, in a reorganization proceeding involving the issuance of securities, all the property must be considered, p. 214.

Security issues — Financial condition — Legal requirements of soundness — Traction.

4. The Commission found the financial condition and prospects of a transportation system serving the largest metropolitan center in the state, and one of the largest and most prosperous in the United States, sufficiently sound to warrant proposed capitalization under § 62, Public Service Law of Missouri, p. 216.

Security issues — Validity conditioned on actual transfer to reorganization committee — Street railways.

5. Security issues authorized by the State Commission in pursuance of its approval of a reorganization plan of a traction system still operated by receivers who had not yet formally transferred title to the reorganization committee, were not to be delivered or otherwise disposed of until the committee filed evidence of a complete and satisfactory transfer of the properties involved and due authorization of a proposed stock increase, p. 216.

[October 1, 1927.]

APPLICATION of a reorganization committee of approval of reorganization plan and for other relief; plan approved; relief ordered.

By the Commission:

I.

This case comes before the Commission upon joint application of

(a) F. O. Watts et al., as a reorganization committee under

a plan and agreement dated October 1, 1924 for the reorganization of United Railways Company of St. Louis,

(b) St. Louis Public Service Company,

and

(c) City & Suburban Public Service Company.

In the said application petitioners request that this Commission take such action, conduct such proceedings, and enter such orders as may be just and proper in the premises for the authorization of the plan and agreement dated October 1, 1924, for the reorganization of United Railways Company of St. Louis; for the authorization of the execution of a mortgage; for the authorization of the issuance of securities; and for other relief.

The said application was filed on August 1, 1927, and a hearing thereon was held before the entire Commission at Jefferson City, Missouri, on September 2, 1927. The city of St. Louis, Missouri, was represented at the said hearing by its counsel, Julius T. Muench and Forrest G. Ferris, Jr.

II.

The Receivership.

The receivership of the United Railways Company of St. Louis dates back to April 12, 1919, on which date, as the result of bankruptcy proceedings instituted in the United States District Court for the Eastern Division of the Eastern District of Missouri, Rolla Wells was appointed receiver of its properties. Subsequently various negotiations looking towards the reorganization of the said company were had, which negotiations finally culminated in the promulgation of the plan and agreement for reorganization dated October 1, 1924, approval of which is herein sought.

Thereafter, to wit on April 1, 1927, a final decree was entered by the United States District Court having jurisdiction wherein certain mortgages on the properties of the company were ordered foreclosed, and all of the properties, franchises, and assets of the said company and its receiver were ordered and directed to be sold at public auction. Pursuant to the said decree such sale was held on August 1, 1927 in St. Louis, Missouri, at which time and place the said properties, franchises, and assets were pur-

chased by Walter de W. H. Bradley and Lloyd H. Landau, acting for and on behalf of the reorganization committee constituted under the aforesaid plan and agreement. An order confirming the said sale was issued by the said Court on August 17, 1927.

III.

The Reorganization Plan.

The plan and agreement for the reorganization of United Railways Company of St. Louis is quite voluminous and will not be reproduced, in its entirety, herein. In lieu thereof, the principal features of the said plan will be set forth.

Objects of the Plan.

The stated objects of the plan and agreement are:

"The reorganization is intended to accomplish the termination of the receivership; the reduction of fixed charges to an amount safely within the earning capacity of the property; settlement of the litigation and controversies which heretofore prevented reorganization of the properties; a fair adjustment of the respective interests of the various security holders; an adequate provision for present and future capital requirements; and to place the property in a position to render the highest standard of public service. In particular the reorganization is intended to prevent separation of the properties and to continue under one management all of the properties now comprising the United Railways System."

The Reorganization Committee.

The personnel of the said reorganization committee and its secretary and manager are: F. O. Watts, Chairman, Edwin M. Bulkley, William P. Gest, J. K. Newman, A. L. Shapleigh, J. Sheppard Smith, D. Sommers, and Walter H. Bradley, Secretary, and Newman, Saunders & Co., Inc., Manager.

Approval and Adoption—The plan and agreement has been adopted and approved by the following protective committees:

St. Louis Transit Company improvement 20-year 5 per cent gold bondholders' committee.

United Railways Company of St. Louis divisional bondholders' committee.

St. Louis & Suburban Railway Company general mortgage 5 per cent gold bondholders' committee.

St. Louis & Suburban Railway Company first mortgage 5 per cent (8 per cent) gold bondholders' committee.

United Railways Company of St. Louis preferred stockholders' committee.

United Railways Company of St. Louis common stockholders' committee.

New Corporations—Two new Missouri corporations have been formed pursuant to the provisions of the plan, by name St. Louis Public Service Company and City & Suburban Public Service Company.

The St. Louis Public Service Company is the principal company; it is to be the operating company and will own substantially all of the capital stock of the City & Suburban Public Service Company. All of the foreclosed properties with the exception of certain property secured by what is known as the St. Louis and suburban general mortgage, are to be immediately transferred and conveyed to the said St. Louis Public Service Company.

The City and Suburban Public Service Company was formed solely for the purpose of taking title, in the first instance, to the property secured by the said St. Louis and suburban general mortgage. The said City & Suburban Public Service Company will place a new mortgage on such property and will issue new bonds thereon, after which it will transfer and convey such property to the St. Louis Public Service Company. This arrangement is said to be necessary on account of certain mortgage provisions.

Modification of Plan—The plan and agreement as originally promulgated has been modified to some extent by reason of the retirement on April 1, 1926, of certain securities specifically dealt with under the plan. These said securities were paid off in cash and consisted of the following:

Bonds		
Cass avenue and Fair Grounds Railway Company, first mortgage 5 per cent (6 per cent) gold bonds	$1,640,000.00	
Compton Heights, Union Depot & Merchants Terminal Railroad Company first mortgage 6 per cent bonds	986,000.00	
Lindell Railway Company first mortgage 5 per cent (8 per cent) gold bonds	1,474,000.00	
Total bonds		$4,100,000.00
Receivers Certificates		
Series B, 6 per cent receivers certificates		4,200,000.00
Total securities retired on April 1, 1926		$8,300,000.00

The funds necessary for the retirement of the said securities were secured from the following sources:

From the sale at par to the reorganization committee of $6,000,000 principal amount of United Railways Company of St. Louis first general mortgage 4 per cent gold bonds	$6,000,000.00
From current funds in hands of the receiver	2,300,000.00
Total	$8,300,000.00

Securities and Unsecured Debt Now Outstanding and Dealt with under the Plan—The secured and unsecured debts and the stocks at present outstanding and now dealt with under the plan and agreement are summarized in the following tabulation:

Bonds		
St. Louis & Suburban Railway Company first mortgage 5 per cent (8 per cent) bonds	$2,000,000.00	
St. Louis & Suburban Railway Company general mortgage 5 per cent bonds	4,500,000.00	
St. Louis Transit Company improvement 20-year 5 per cent gold bonds	9,790,000.00	
United Railways Company of St. Louis first general mortgage 4 per cent gold bonds	36,300,000.00	
Total bonds		$52,590,000.00
Stocks		
Preferred stock of United Railways Company of St. Louis	$16,383,000.00	
Common stock of United Railways Company of St. Louis	24,913,000.00	
Total stocks		$41,296,000.00
Unsecured Debt		
Unsecured claims, judgments, etc., due to creditors of United Railways Company of St. Louis, with interest on such claims and judgments to April 12, 1919, as allowed by Federal Court		$2,898,340.61
Total of all		$96,784,340.61

Adjustments of Securities and Unsecured Debt—The adjustments to be made under the plan with respect to each issue of outstanding securities, and the unsecured debt are:

United Railways Company of St. Louis, First General Mortgage 4 Per Cent Gold Bonds, $36,300,000.

This issue is to remain undisturbed. Such bonds will remain a lien on the property and will be assumed by St. Louis Public Service Company.

St. Louis and Suburban First Mortgage 5 Per Cent (8 Per Cent) Bonds, $2,000,000.

This issue is to be paid off in cash with interest at 5 per cent from October 1, 1924 to date of adjustment.

St. Louis and Suburban General Mortgage 5 Per Cent Bonds, $4,500,000.

This issue is to be retired by the issuance in lieu thereof of an equivalent amount of first mortgage 5 per cent sinking fund gold bonds, due July 1, 1934, of City & Suburban Public Service Company. The new bonds to be issued will be secured by a mortgage upon the same property covered by the mortgage securing the bonds to be retired.

More than 87 per cent of this class of bonds have been deposited by the holders thereof for adjustment.

St. Louis Transit Company Improvement 20-Year 5 Per Cent Gold Bonds, $9,790,000.

In the adjustment of this issue, each holder of $1,000 of such bonds is offered:

1. $300 in cash together with interest on such cash payment at 5 per cent from October 1, 1924 to date of adjustment.

2. 5½ shares of no par value preferred stock of St. Louis Public Service Company, together with an amount equivalent to dividends on the said shares at the rate of $7 per share per annum from October 1, 1924 to date of adjustment.

3. The right to subscribe to ten shares of the no par value common stock of St. Louis Public Service Company, at $12.50 per share.

More than 99.76 per cent of this class of bonds have been deposited for adjustment.

Preferred Stock, United Railways Company of St. Louis, $16,383,000.

In the adjustment of preferred stock of United Railways Company of St. Louis, each holder of $100 of such stock is offered:

1. The right to subscribe to 1½ shares of the no par value common stock of St. Louis Public Service Company at $12.50 per share.

2. The right to subscribe, pro rata, at $12.50 per share, to any of the no par value common stock of St. Louis Public Service Company offered to but not subscribed for by the holders of St. Louis Transit Company improvement 20-year gold bonds.

More than 96 per cent of the preferred stock of United Railways Company of St. Louis has been deposited for adjustment in accordance with this offer.

Common Stock, United Railways Company of St. Louis, $24,913,000.

In the adjustment of common stock of United Railways Company of St. Louis, the holders thereof are offered:

The right to subscribe, pro rata, at $12.50 per share, to any of the no par value common stock of St. Louis Public Service Company offered to but not subscribed for by the holders of St. Louis Transit Company Improvement 20-year gold bonds and/or the preferred stockholders of United Railways Company of St. Louis.

More than 89 per cent of the common stock of United Railways Company has been deposited for adjustment in accordance with this offer.

Unsecured Creditors, $2,898,340.61.

Under the terms of an offer to unsecured creditors, made on July 30, 1927 and approved by the Federal Court on August 12, 1927, such unsecured creditors for each $100 of approved claims held may, at their option, receive ⅓ in cash or ⅔ share of no par value preferred stock of St. Louis Public Service Company.

With the exception of the city of St. Louis, all unsecured creditors have signified their intention of taking preferred stock in adjustment. The city of St. Louis, the holder of an approved claim in the amount of $2,431,868.45, has been given four

months' time by the Federal Court, in which to decide which of the two offers to accept.

Provisions for Nonassenting Security Holders.—The plan and agreement makes no provision for payment in cash to any holders of bonds who do not participate in the plan. Any securities which would be deliverable under the plan to such holders had they participated may remain unissued or be disposed of by the reorganization committee for the purposes of the reorganization.

Reorganization Fees and Expenses.—The plan and agreement provides that the expenses of the reorganization, including expenses of foreclosure and sale, compensation, and expenses of committees, allowances, counsel fees, court costs, master's and referee's fees, services of experts, commissions of underwriters and syndicates, costs and taxes on incorporation and reorganization, and kindred items, shall be paid from the cash received by the reorganization committee; and that all securities deposited under the plan or becoming subject to its provisions shall be subject to a lien for their pro rata share of such expenses.

Bonds Purchased from the Receiver by Reorganization Committee.—As is hereinbefore shown the reorganization committee on April 1, 1926, purchased from the receiver, $6,000,000 principal amount of United Railways Company of St. Louis first general mortgage 4 per cent gold bonds and paid $6,000,000 in cash therefor, the said purchase being made in order to provide the balance of the funds necessary to retire $8,300,000 par value of old securites.

In order to make the said payment of $6,000,000 the reorganization committee accomplished a short-term loan of $4,000,000 secured by the collateral deposit of the $6,000,000 par value of United Railways Company of St. Louis first general mortgage 4 per cent gold bonds and it supplied the remaining $2,000,000 from the cash it had received from initial payments of subscriptions to the common stock of St. Louis Public Service Company.

The reorganization committee now proposes to increase the said short term loan to $5,000,000. Upon completion of the reorganization such short term loan will be assumed by the St. Louis Public Service Company; likewise the $6,000,000 par value of United Railways Company of St. Louis first general mortgage 4 per cent gold bonds will become the property of the St. Louis Public Service Company, subject to the lien thereon occasioned by the short-term loan.

Cash Required and Available under the Plan—Cash Deficit.—The total cash required to complete the reorganization and to furnish working capital is not now known for the reason that the amount of the reorganization fees and expenses cannot at this time be accurately determined.

Applicants herein have submitted a statement showing that the total cash available or to be available for the purposes of the reorganization is $885,357 short of the amount necessary to adjust the various issues of securities and to provide working capital; and that such deficit will be further increased by the now unknown amount of the reorganization fees and expenses.

A decision as to how this deficit will be permanently financed has not as yet been made; under the plan and agreement the reorganization committee is empowered to authorize and direct for such purpose, the issuance of first and refunding mortgage bonds and/or collateral gold notes and/or prior preferred stock and/or preferred stock and/or common stock. Until such decision is reached the deficit will be financed by temporary borrowings, arrangements for which have been made.

New Securities to Be Now Issued.—The new securities to be now issued and disposition thereof are shown in the following table:

Bonds	
City & Suburban Public Service Company first mortgage 5 per cent sinking fund gold bonds due July 1, 1934 to be issued in respect of St. Louis & Suburban general mortgage 5 per cent bonds	$4,500,000.00
Total bonds	$4,500,000.00

Preferred Stock		
St. Louis Public Service Company, no-par value preferred stock to be issued:		
In respect of St. Louis Transit Company Improvement 20-year 5 per cent gold bonds	53,845	shares
In respect of claims and judgments of unsecured creditors	19,348	"
Total preferred stock	73,193	"
Common Stock		
St. Louis Public Service Company no-par value common stock to be issued in adjustment at $12.50 per share:		
In respect of St. Louis Transit Company improvement 20-year 5 per cent gold bonds and/or preferred stock of United Railways Company of St. Louis and/or common stock of United Railways Company of St. Louis	97,900	shares
In respect of preferred stock of United Railways Company of St. Louis and/or common stock of United Railways Company of St. Louis	245,745	"
Total common stock	343,645	"

New Capitalization and Fixed Charges.—The new capitalization and fixed charges after reorganization (not including securities to be later issued with respect to the cash deficit) will be:

Funded Debt.

Par Value.		Annual Interest Charges.
$30,300,000	United Railways Company of St. Louis first general mortgage 4 per cent gold bonds due July 1, 1934 (In hands of public)	$1,212,000
6,000,000	United Railways Company of St. Louis first general mortgage 4 per cent gold bonds due July 1, 1934 (Collateral for $5,000,000 short-term loan)	240,000
4,500,000	City & Suburban Public Service Company first mortgage 5 per cent sinking fund gold bonds due July 1, 1934	225,000
$40,800,000	Total Funded Debt	$1,677,000

Preferred Stock

Shares.		Annual Dividends.
73,193	St. Louis Public Service Company no-par value preferred stock entitled to dividends cumulative without interest at the rate of $7 per share per annum, to have a liquidating value of $100 per share and to be redeemable at $100 per share and all arrearages in cumulative dividends	$512,351
73,193	Total Preferred Stock	$512,351

Common Stock.

Shares.		Annual Dividends.
343,645	St. Louis Public Service Company no-par value common stock	.....
343,645	Total Common Stock	

Decreases in Outstanding Securities.—Including a reduction

of $2,300,000 made in the adjustment of April 1, 1926 hereinbefore referred to, the outstanding funded debt of this transportation system will be reduced by reason of this reorganization by $14,090,000. Preferred stock will be changed from a par or face value of $16,383,000, bearing 5 per cent annual dividends to 73,193 shares having no par value, bearing annual dividends at the rate of $7 per share and redeemable at $100 per share. And common stock will be changed from a par or face value of $24,913,000 to 343,645 shares having no par or face value.

Decreases in Fixed Charges.—Annual charges for interest on funded debt will be reduced by reason of this reorganization by $936,980; the annual requirement for dividends on preferred stock will be reduced by $306,799.

IV.

[1] The aforesaid plan and agreement for reorganization of the United Railways Company of St. Louis has been approved by the United States District Court having jurisdiction over the receivership of the said company and the settlements to be made under the plan with the various interests involved likewise have been approved by the said Court. Nor was any protest made to this Commission with respect to the settlements so to be made; and it is particularly worthy of note that a large percentage of the holders of the securities to be adjusted have agreed to the said settlements.

As is before herein shown, the city of St. Louis was represented at the hearing held by this Commission in this case on September 2, 1927; while counsel for the said city did not formally object to the issuance of an order by this Commission granting the prayers of the applicants, he stated,

"I want to say this as far as the city is concerned, it appears to us that the entire application is premature. There is not anything upon which the Commission, at the present time, could base any order, because there is not at the present time any finding of value and there is not any definite plan laid before the Commission, in other words, as I understand this plan, it is not complete."

The Commission, after careful consideration of the said plan

and all the evidence and testimony thereto pertaining, is of the opinion that the plan itself is complete and that it contains many commendable features. True, the application herein made does not contain a request for the authorization of securities to provide for the existing cash deficit and for the settlement of the expense of the reorganization; but the plan itself specifically provides for the manner in which such necessities may be financed. And arrangements for the temporary financing thereof, pending a decision as to the kind of securities to be issued therefor, have been made.

[2] The views above expressed are not to be interpreted as implying any obligation on the part of this Commission binding it to authorize or approve any additional securities later to be requested. Application to this Commission for the approval of such additional securities shall be made in the regular manner; a decision on such application will be made by the Commission based on the merits thereof.

Fair Value of the Property Involved—

Proceedings involving the valuation of this property are now pending before this Commission in Consolidated Cause Nos. 1457 and 1736 and certain evidence and exhibits have been presented therein, but the said case has been continued for further hearing, for additional evidence and for final determination.

The applicants herein have presented for consideration in this present case, exhibits with respect to the value of the property, exactly similar to those filed in the aforesaid consolidated cause now pending; it appears, however, that consideration of the information contained in the said exhibits should not be had until the proceedings in the said consolidated cause shall have been completed.

[3] In addition to the values claimed in the before mentioned exhibits, applicants rely, for the purpose of this reorganization, upon a tentative valuation of $52,024,192 placed upon the property of the United Railways Company of St. Louis by this Commission in its report and order issued on June 25, 1927 in Consolidated Cases Nos. 1457 and 1736. This said valuation was

made as of date December 31, 1926, for the purpose of prescribing temporary rates of fare. Attention is directed to the fact that said tentative value includes operating property of the said company only; while such procedure is proper in matters relating to the prescription of rates, in a reorganization proceeding involving the issuance of securities, all the property must needs be considered. Therefore, such tentative valuation is properly subject to increase by the amount of the nonoperating property of the said company, as well as by the amount of the entire properties of the Florissant Construction, Real Estate & Investment Company and the Missouri Electric Railroad Company, the entire capital stock and funded debt of which is owned by the said United Railways Company of St. Louis.

Other evidence presented herein relating to the fair present value of the properties consists of a valuation of such properties made by this Commission as of January 1, 1919, and a statement of the net expenditures for additions and betterments to the properties during the period between January 1, 1919 and December 31, 1926.

The said valuation as of January 1, 1919, made by this Commission, as reported in 13 Mo. P. S. C. R. 522, P.U.R.1923D, 759, follows:

Total fair value of all property of United Railways Company of St. Louis including property of the Florissant Construction, Real Estate & Investment Company, as of January 1, 1919 ..	$52,838,110
Total fair value of property of Missouri Electric Railroad Company as of January 1, 1919	781,949
Grand total	$53,620,059

The net expenditures for additions and betterments to the properties during the period between January 1, 1919 and December 31, 1926, as disclosed by applicants Exhibit No. 2, are:

Gross expenditures	$9,907,286
Less retirals	3,481,343
Net expenditures	$6,425,943

Earning Power—

The net earnings of this property available for interest, dividends, contingencies, and surplus for each of the past three

years, as disclosed by the annual reports of the company on file with this Commission, have been:

1924	$2,934,876
1925	2,670,209
1926	2,632,204

The maximum adult fare charged by the said company during the years 1924, 1925, and 1926 was 7 cents per passenger; effective with July 5, 1927, the said company was authorized by this Commission to temporarily increase its adult fare to 8 cents cash, or two tokens for 15 cents. In its report and order dated June 25, 1927, in Cases Nos. 1457 and 1736, wherein such temporary increase in fare was granted, the Commission estimated that by reason thereof, the net earnings of the said company would be increased at the rate of $1,238,846 per year.

Conclusions as to Value.

[4] Considering all the evidence as to value and all the elements of value, taking into consideration all the requirements of § 62 of the Public Service Commission Law, and regarding that this transportation system is in successful operation and serves the largest metropolitan center in this state, and one of the largest and most prosperous in the entire United States, we find that the fair value of the property involved is sufficient under the said § 62 of the Public Service Commission Law to warrant the capitalization now proposed to be issued, to wit:

$40,800,000 principle amount of bonds
73,193 shares of no par value preferred stock
and
343,645 shares of no par value common stock.

Transfer of Properties — Increase in Capitalization.

[5] The properties herein involved are still being operated by the receiver thereof. While such properties were sold at public auction, in accordance with orders of the court, to individuals acting for and on behalf of the reorganization committee and while such sale was confirmed by the said Court, proper deeds or other instruments conveying and transferring such properties to the new companies formed to receive the same, have not as yet been passed.

Nor has application been made by the St. Louis Public Service Company to the proper state authorities for permission

to increase its authorized capital stock by the amount necessary to enable it to issue the number of shares herein requested to be authorized by this Commission. Therefore, before the securities hereinafter authorized shall be delivered or otherwise disposed of, the applicants herein will be required to file with this Commission evidence of a complete and satisfactory nature showing that the said applicants are actually possessed of the said properties, and that their capitalization has been duly authorized by the proper authorities.

In Conclusion.

As we have before stated, in our opinion the plan and agreement contains many commendable features which have been set out in this report, not the least of which are the substantial reductions made in the amounts of the bonded indebtedness and in the amounts of the annual fixed charges. And it cannot be doubted that the termination of the receivership and the reorganization of the system will result in benefit both to the public and the owners of the properties.

We have, therefore, concluded to authorize the reorganization of the United Railways Company of St. Louis under the laws of this state and otherwise in conformity with this report and the order of the Commission entered on this date.

Brown, Chairman, Ing, and Porter, Commissioners, concur; Calfee and Hutchison, Commissioners, absent.

MISSOURI PUBLIC SERVICE COMMISSION.

RE YELLOWAY, INCORPORATED.

[Case No. 5317.]

Commissions — Jurisdiction, powers, and duties — Conflicting ordinances.

1. The law of the state imposes upon the Public Service Commission the duty to regulate rates and supervise the service of public utilities and no city, town, or village of the state can by ordinances or otherwise nullify or make inoperative such law although all municipalities still retain the control of the use of their streets, p. 229.

P.U.R.1928A.

Certificates of convenience and necessity — Jurisdiction of Commission over intrastate operation — Municipal jurisdiction — Busses.

2. The necessity for operation of a motor carrier whose route is largely between different municipalities of a state is strictly a matter for the determination of the Commission and a law of Missouri (1927, § 1, p. 403) giving a city power to supervise rates and service of motor utilities applies only to such systems as operate wholly, or to a major extent, within corporate limits of the same, p. 229.

Certificates of convenience and necessity — Operation in good faith prior to regulation — Busses.

3. In the absence of contrary evidence the presumption prevails that an applicant for a certificate of convenience and necessity operating in good faith prior to regulation is rendering service necessary to public convenience (Mo. Laws 1927, § 11, p. 409), p. 230.

Monopoly and competition — Rate cutting — Busses.

4. The Commission will not tolerate reckless and unsound rate-cutting between motor carriers for the purpose of destroying each other at the expense of exhaustion of utility assets for which the public must eventually suffer, p. 230.

Monopoly and competition — Railroads and busses — Loss of patronage — Causes.

5. A certificate of convenience was granted to a motor utility notwithstanding alleged competition to existing railroads in view of the major portion of proven loss of patronage to these carriers during recent years being due to private automobiles rather than those operated for hire, p. 231.

[October 13, 1927.]

APPLICATION for certificate of convenience and necessity; approved.

Statement.

Ing, Commissioner: YellowaY, Inc. is a motor bus corporation engaged in interstate and intrastate transportation of persons for hire, and operates over various routes as far west as Los Angeles and San Francisco, California, and as far east as Detroit, Michigan.

On July 15, 1927, this company filed an application with this Commission for a certificate of convenience and necessity to own, maintain, and operate a motor transportation system from Kansas City to St. Louis, Missouri, over U. S. Highway No. 40. The application alleges, among other things, that the applicant is a Colorado corporation and is licensed to do business in the state of Missouri; that its general offices are located at

1758 California street, Denver, Colorado; that its principal office in the state of Missouri is at 1212 McGee street, Kansas City, Missouri, and that C. A. Patterson is its statutory agent, as required by law, with his principal office and place of business at 1212 McGee street, Kansas City, Missouri.

There was filed with the application exhibits designated alphabetically from A to I, inclusive.

Exhibit A is a statement giving detailed information concerning the ownership and condition of the physical property used and to be used by the applicant in the conduct of its business in the state of Missouri.

Exhibit B is a statement giving detailed information concerning the financial condition of the applicant.

Exhhibit C is a map setting forth the route of YellowaY, Inc. in the state of Missouri and showing competing rail carriers.

Exhibit D is a map showing the route of YellowaY, Inc. from Kansas City to St. Louis, Missouri, showing connecting motor carriers.

Exhibit E is a map certified by the chief engineer of the Missouri State Highway Commission, showing correct mileages in the various counties in the state of Missouri traversed by the route of YellowaY, Inc.

Exhibit F is the proposed time schedule of the applicant.

Exhibit G is the proposed tariff schedule of the applicant, showing the passenger rates to be charged between the several cities, towns, and villages through which it passes.

Exhibit H is printed maps and blue prints showing the highways and public places upon and over which applicant desires to operate, showing the miles of route and fraction thereof for each incorporated city, town or village, county and state highway, together with certificates of city engineers and the State Highway Commission as to the mileage of said route.

Exhibit I is a certified copy of the charter of applicant as granted by the state of Colorado, together with a certified copy of the license and certificate of the applicant to do business in the state of Missouri.

The application states that the applicant desires to operate from within the city of Kansas City, Missouri, through the

cities of Odessa, Concordia, Sweet Springs, Air Line, Boonville, Columbia, Fulton, Williamsburg, Mineola, High Hill, Jonesburg, Warrenton, Wright City, Wentzville, and St. Charles, into the city of St. Louis. The application also states that the proposed route extends through the counties of St. Louis, St. Charles, Warren, Montgomery, Callaway, Boone, Cooper, Howard, Saline, Lafayette, and Jackson.

The applicant alleges that the mileage over which it desires to operate in the city of St. Louis is 9¾ miles; in the county of St. Louis 13.30 miles; in the city of St. Charles 1.47 miles; in the county of St. Charles 27.22 miles; in the county of Warren 17.28 miles; in the county of Montgomery 22.09 miles; in the city of Fulton 2 miles; in the county of Callaway 32.3 miles; in the city of Columbia 2.6 miles; in the city of Boonville 1.7 miles; in the county of Boone 23.60 miles; in the county of Howard 11.26 miles; in the county of Cooper 18.67 miles; in the county of Saline 24.47 miles; in the county of Lafayette 33.52 miles; in the county of Jackson 22.21 miles, and in the city of Kansas City 10.50 miles.

The applicant states that the persons, firms, and corporations now furnishing service by means of motor propelled vehicles and steam and electric railways between any of the points, or along any portion of the route proposed to be served, are as follows: Chicago, Burlington & Quincy Railway Company; Chicago, Rock Island & Pacific Railway Company; Missouri, Kansas & Texas Railway Company; Chicago & Alton Railway Company; Missouri Pacific Railroad Company; Wabash Railway Company; Red and White Bus Company; Midwest Transit Company; American Motor Stages Company, and the Purple Swan Safety Motor Coach Lines, Inc.

The applicant alleges that previous to the 13th day of February, 1926, the Western Auto Travel Agency, Inc. and the Auto Transportation Company, together with the applicant owned, operated, and controlled a certain motor transportation system for the transportation of persons and property over the route now sought to be served by applicant, and between the fixed termini set forth in this application, and that said operation was in good faith and was rendering satisfactory and de-

pendable service by motor vehicles from the 14th day of October, 1924, to and including the 13th day of February, 1926. That on the 13th day of February, 1926, said companies above referred to and the applicant commenced an operation for the carrying of persons and property for hire over said above described route with the first busses in excess of seven-passenger capacity ever operated between Kansas City and St. Louis, Missouri, and from the 13th day of February, 1926, to and including the date of this application the applicant has never failed to operate over the said route or between the fixed termini, with the exception of such portion of the roads as were impassable through acts of God or involuntary stoppages of equipment on the road. The applicant alleges that on or about the first day of April, 1926, the applicant purchased and placed in operation over said route six 25-passenger Mack A. B. busses, and continued the operation with said equipment and with additional equipment purchased or leased from time to time, to and including the date of this application. That the applicant was operating in good faith with said equipment and with additional equipment on the 1st day of December, 1926, and that the applicant was rendering satisfactory and dependable service over said route during all the times mentioned herein and particularly on and since the 1st day of December, 1926. The application alleges that in addition to the said equipment owned and operated by the applicant it has leased from time to time such additional equipment as would best serve the interests of the public and as was necessary and convenient to the public interests and operation of said route.

The application states that the proposed route of travel between Kansas City and St. Louis, Missouri, is an integral and necessary part and connection of its interstate transportation system, and that passengers are now being provided with transportation over said route of travel, using the said portion of the highway between Kansas City and St. Louis as a part of their said trips lying between the several cities and towns of applicant's interstate system.

The applicant further alleges that he has purchased new and additional equipment to be used on said proposed route, and

that such new and additional equipment consists of six new 30-passenger Mack type busses, at a purchase price of approximately $14,000 each, and that the applicant is now waiting for the delivery of said equipment which is to be delivered as soon as the same can be completed by the manufacturer.

The applicant states that it is carrying public liability and property damage insurance covering its said operation, and has been carrying such insurance, and that application has now been made to the insurance company to change the present policies, which provide for $10,000 per person and $35,000 total liability, and $1,000 property damage, to a limit of $10,000 per person, $50,000 total liability, and $1,000 property damage.

The applicant alleges that the motor bus service now in operation and for which a certificate is hereby sought, is necessary and convenient to the public. That railroad, electric tram service, and other bus service is not adequate to serve the public needs. That the schedules which have been established and are being hereby applied for are necessary to the public, and are particularly convenient and necessary to the population of those cities, towns, and villages which are not on the main line of any railroad or tramway system; that a large number of people over a period of years have grown to depend on said bus service of the applicant, and that the applicant has established suitable and proper terminals and rest stations in all of the communities it serves to better serve the public need, and that proper eating houses and toilet facilities have been provided for the public.

Answers were filed in due time by the cities of St. Louis and Kansas City, Missouri; William W. Wheelock and William J. Bierd, receivers of the Chicago & Alton Railway Company; the Purple Swan Safety Coach Lines, Inc.; Wabash Railway Company; the Missouri Pacific Railroad Company; Chicago, Burlington & Quincy Railway Company; and the Chicago, Rock Island & Pacific Railway Company. In addition to those who filed answers, counsel for the American Motor Stages Company appeared and participated in the hearing.

Counsel for the city of St. Louis, in their answer, stated that there is not on file in the office of this Commission any evidence that the applicant has received the consent of a franchise or per-

mit of the city of St. Louis for the operation of the applicant within said city, and that applicant has not, in fact, obtained from the city of St. Louis, any such consent, franchise, or permit. They also call attention to the provisions of § 1, page 403, Laws of Missouri, 1927, and state that the Commission is without jurisdiction to grant a certificate of convenience and necessity for the operation over the particular line or route set out in the application and which lies within the corporate limits of the city of St. Louis. They further allege that by virtue of § 2 of Ordinance No. 30,911, a license and permit from the city of St. Louis is a condition precedent to the operation of motor busses by applicant over any street within the corporate limits of said city. Counsel for said city also call attention to § 2, page 404, Laws of Missouri, 1927, and state that by virtue of that provision, the city of St. Louis has the exclusive and undelegated authority and right to determine for itself the extent to which its streets may be occupied and traversed by the applicant, irrespective of the question of public convenience and necessity, and that the city of St. Louis has exclusive jurisdiction over all questions of rates and service of this applicant covering operations within its corporate limits.

Counsel for the city of St. Louis further allege that on July 19, 1927, the Board of Public Service of the city of St. Louis approved the application of YellowaY, Inc. for a permit to operate in the city of St. Louis; that this permit will not be issued until the applicant shall procure a license from the license collector of the city of St. Louis, post a $3,000 indemnifying bond with the city of St. Louis, and otherwise comply with the provisions of Ordinance No. 30,911 of said city; that the route set out in the permit is an entirely different route from that set out in the application filed with the Commission in this proceeding, and that any order which this Commission may make in the premises is subject to all the terms, conditions, and provisions imposed by the city of St. Louis, as set out in its ordinances and permit, if a permit be, in fact, actually issued.

Counsel for the city of St. Louis also call the attention of the Commission to certain alleged discriminations and excessive rates in the schedule filed with the application, and refer specifi-

cally to the applicant's one-way rate between St. Louis and St. Charles of 60 cents, whereas the rate between the same points, as proposed by the Electric Railway Company, is 35 cents.

The answer of the city of Kansas City has the same general allegation as that of the city of St. Louis with reference to the provisions of § 1, page 403, Laws of Missouri, 1927, and the provisions of § 2, page 404, Laws of Missouri, 1927. It also calls attention to the provisions of §§ 25 and 26 of Ordinance No. 50,975, of the city of Kansas City, Missouri.

Without going into detail relative to the answers of the answering railroad companies, they allege in general that the railroads now engaged in the transportation of persons and property between St. Louis and Kansas City, Missouri, are affording adequate, sufficient, dependable, and satisfactory transportation facilities for carriage by rail between said points; that the transportation service afforded by the applicant is not necessary for serving the public convenience and necessity, which is already efficiently and adequately served by the various steam railroad carriers operating between said points; that the only reason the applicant can hope to compete with the steam railroads for through traffic is because it proposes fares and charges which are unreasonably low and inadequate, and that the authorization of said low fares and charges is protested because they would create undue and unreasonable discrimination and unfair competition, which would result disastrously, not only to the steam railroad carriers, but to the applicant as well.

This case was heard by the Commission at its hearing room in Jefferson City, Missouri, on the first day of August, 1927.

Facts.

YellowaY, Inc. is an interstate and intrastate motor bus operator, and was incorporated under the laws of the state of Colorado January 6, 1926. Prior to its incorporation, however, its owners were engaged in motor transportation, and have been operating in Missouri since October 14, 1924. The applicant's principal office is at 1758 California street, Denver, Colorado, and its principal office in the state of Missouri is at 1212 McGee street, Kansas City, Missouri.

On December 1, 1926, the applicant had in operation on its proposed route from Kansas City to St. Louis, Missouri, six 25-passenger Mack type busses, all owned by the applicant except one, which was leased. At the time of the hearing of this cause, the applicant had in operation between St. Louis and Kansas City seven Mack type busses.

Several witnesses living along the proposed route herein testified that the applicant was rendering satisfactory and dependable service on December 1, 1926, and that the service now being rendered is one of public convenience and necessity. These witnesses came from St. Louis, Kansas City, Jonesburg, Warrenton, Wright City, St. Charles, Montgomery City, Warrensburg, Fulton, Columbia, Boonville, Odessa, Oak Grove, and other towns, and some farmers living along State Highway No. 40. Some of the witnesses expressed a preference for the service rendered by the applicant over that being rendered by railroads, for the reason, as they alleged, that they can get better and quicker service; quicker by reason of the fact that they can go and return without the delay between trips when traveling by rail. Witnesses also stated that the drivers of applicant's busses are uniformly competent and courteous.

A great deal of time was consumed in the hearing of this cause in developing facts as to rate cutting, which has been indulged in by the applicant and other motor carriers operating between Kansas City and St. Louis. Competition among the motor carriers operating over the route for which the applicant seeks a certificate of convenience and necessity developed soon after the applicant and other motor carriers began operations, but in the spring of 1927 it became so acute that fares between Kansas City and St. Louis were, on one occasion, cut to as low as 75 cents, and often as low as $3 or $4. The published rate of $7 one-way fare, or round trip for $12.50, meant but little. The only place the ticket cost the patron the published rate was at the company's office. Others who were authorized to sell tickets for applicant, and there were many of them, sold tickets for any price they could get. In this "rate war" the public had to depend upon daily quotations to find out what the fare was

on the various bus lines operating between St. Louis and Kansas City.

The testimony shows that the mileage traversed by applicant over the route described herein is as follows: In the City of St. Louis 9¾ miles; over State Highway No. 40, 244.56 miles; the city of St. Charles 1.47 miles; over U. S. Highway No. 54, 7 miles; in the city of Fulton 2 miles; in the city of Columbia 2.6 miles; in the city of Boonville 1.7 miles; and in the city of Kansas City 10.50 miles.

The testimony shows that some of the towns served by applicant have no railroad service whatever; among that number being Danville, Mineola, Williamsburg, Calwood, and Millersburg. 60 to 80 per cent of the business of the applicant over this proposed route is local; that is, traffic to and from points between St. Louis and Kansas City. The busses are not always loaded to capacity, but average from 60 to 65 per cent of capacity.

There was testimony that the applicant has had some accidents in Missouri and other states. Judgments have been rendered and some suits are now pending for trial and some on appeal. All judgments not appealed from have been settled.

The testimony shows that the applicant has not filed any annual report, or other report, in the state of Colorado, the state of its incorporation.

The applicant filed the required accident insurance policies providing for a minimum of $5,000 for damage to one person and $50,000 for one accident, with a $1,000 property damage.

The Wabash Railway Company offered an exhibit showing the number of trains operating both east and west on the various railroads between St. Louis and Kansas City, and the time of arrival and departure of the various trains. This exhibit shows that over the Wabash there are eight passenger trains daily, four each way; over the Missouri Pacific Railroad there are ten passenger trains daily, five each way; over the Chicago, Rock Island & Pacific Railroad there are four passenger trains daily, two each way; and over the Chicago & Alton, and Chicago, Burlington & Quincy Railroads, jointly, there are two each way.

Wabash Exhibit No. 2 shows that the number of passenger

trains over its lines between St. Louis and Columbia daily is 10, and the number between Kansas City and Columbia is seven.

Wabash Exhibit No. 3 is a comparative statement of its state and interstate business in the state of Missouri, showing comparatively, by years from 1923 to 1926, inclusive, the passengers, miles revenue, and average distance per passenger, both interstate and intrastate. This exhibit shows a decrease of 23 per cent in intrastate passenger business and 2 per cent in interstate passenger business. It shows a decrease of 18 per cent in the intrastate and 1.4 per cent decrease in interstate passenger miles. It shows a decrease of 22 per cent in intrastate and 4.6 per cent in interstate revenue, and a decrease of 6.7 per cent intrastate and .8 per cent interstate of the average distance per passenger. These decreases were attributed by the witness to the loss of the short haul business due to automobile and bus competition, and in a material degree to the hard roads.

Exhibit No. 4, filed by the Wabash Railway Company, shows the number of passenger tickets and revenue of the local one-way tickets for the first five months, by years from 1924 to 1927, inclusive, between St. Louis and Columbia, and Kansas City and Columbia, in both directions. This exhibit shows that the decrease of revenue in the year 1927, as compared with the corresponding period of 1924, was 32 per cent between St. Louis and Columbia, and between Kansas City and Columbia a decrease of 66 per cent. This decrease was attributed by the witness principally to the operation of busses.

Wabash Exhibit No. 5 is a statement of the local ticket sales and revenue from St. Charles to New Florence, for the years 1924 and 1926. This exhibit shows a decrease in revenue for 1926, as compared with 1924, of 82 per cent. The witness called attention to the fact that the proposed route of the applicant parallels the Wabash Railway between St. Charles and New Florence.

Wabash Exhibit No. 6 is a comparative statement of fares between points competitive with the proposed bus lines.

The witness expressed the opinion that the applicant should not have a lower rate per mile than the rates charged by the steam carriers.

The mileage of YellowaY, Inc. between St. Louis and Kansas City is 268 miles, and the mileage over the Wabash is 278.7 miles, according to the testimony of Mr. Blatterman.

The testimony shows that the number of privately owned automobiles, as compared to the population, is approximately one automobile to every five persons.

Missouri Pacific Exhibit No. 1 is a statement of the total revenue, number of passengers carried, average distance per passenger, both state and interstate, of the Missouri Pacific lines in the state of Missouri, for the years 1923 and 1926, inclusive. This exhibit shows a decrease in both interstate and intrastate revenue of 11.3 per cent in 1926, as compared with 1923. The decrease in passengers for the same period was 27.2 per cent, and an increase in the average distance for the same period was 22.8 per cent. This exhibit also shows a decrease in revenue of purely intrastate business for the same period of 24 per cent; a decrease in the number of passengers carried, intrastate, of 31.4 per cent, and an increase in the average distance per passenger of 14.5 per cent. Mr. H. H. Butler, assistant general passenger agent of the Missouri Pacific Railroad Company, stated that the above decreases shown by Missouri Pacific Exhibit No. 1 indicates the loss of the short haul traffic due to automobiles and busses.

Missouri Pacific Exhibit No. 2 furnishes the same information for the whole Missouri Pacific system that Exhibit No. 1 does for the state of Missouri. This exhibit shows a decrease in revenue of 15.4 per cent in 1926, as compared with 1923, and a decrease in passengers carried for the same period of 43.1 per cent. This exhibit also shows an increase in the average distance per passenger carried of 57.8 per cent.

Mr. Butler stated that from a survey made of the operations of the various railroads in Arkansas and Louisiana, and a showing of the bus rates and railroad rates, it was found that the bus rates in said states in the majority of instances are higher than railroad rates. He also stated that it is his information that bus rates in the New England states are generally the same as the railroad rates, but in many instances higher. Mr. Butler stated that on local traffic between St. Louis and Kansas City,

the Missouri Pacific line could carry probably twice as many passengers as it is now carrying. He also stated that he could not say what per cent of the decrease in passenger service is due to privately owned automobiles, nor what per cent is due to bus service, and that he did not think anyone else could say.

The testimony shows that the applicant has not secured authority from the cities of St. Louis and Kansas City to operate over the streets of said cities, and there was no testimony that it has authority to traverse the streets of any city through which it passes on its proposed route. The testimony further shows that the applicant has purchased three additional Mack busses which it proposes to put into operation, these busses being of 30 passenger capacity.

Conclusions.

[1, 2] The issue in this case is whether the applicant should be granted a certificate of convenience and necessity to operate as a motor carrier over the route herein described. We are confronted, however, with the contention of counsel for the city of St. Louis, that this Commission has no jurisdiction in this case, in so far as that part of the route lying within the corporate limits of the city of St. Louis is concerned. Counsel for the cities of St. Louis and Kansas City, both, contend that said cities have the exclusive authority to determine the extent to which their streets may be used by the applicant, but counsel for the city of St. Louis goes farther, and contends that St. Louis has exclusive jurisdiction over all questions of rates and service of the applicant in its operations within the corporate limits of said city. This contention is wholly without merit. The Commission would not, if it could, and could not, if it would, deprive the city of St. Louis of any of the rights guaranteed to it by the laws of this state relative to the control of the use of its streets, or in any other respect, but to concede the contention of its counsel that it has the exclusive right to control questions of rates and service of the applicant, or of any other public utility, would not, in the opinion of the Commission, be in harmony with recent decisions of the supreme court of this state. The city of St. Louis has no more rights in that regard than the smallest

city, town, or village in this state. It is a part of the state of Missouri, and it cannot, by ordinance or otherwise, nullify or make inoperative any of the laws of this state. The Commission understands that the laws of this state impose upon it the duty to regulate rates and supervise the service of public utilities. It will not shirk that duty. It is the duty of the Commission to either grant or refuse a certificate of convenience and necessity to the applicant, as it may find from the facts and laws of the case, and regulate its rates and service, and the city of St. Louis is not excepted from this rule. The applicant is a motor carrier, the major portion of whose route is without the corporate limits of the city of St. Louis, and we do not understand that the Laws of Missouri, 1927, § 1, page 403, cited by counsel for said city apply to the applicant, but that said law applies solely to motor carriers whose operations are wholly within the corporate limits of a city, or one of which a major portion of its route is within the limits of some city.

[3] The testimony in this case shows that the applicant was operating in good faith, rendering satisfactory and dependable service by motor vehicles, over the route for which a certificate of convenience and necessity is sought in this proceeding, on and prior to December 1, 1926. That being true, the presumption prevails that the service rendered is necessary to public convenience, in the absence of evidence overcoming such presumption, Laws of Missouri, 1927, § 11, page 409.

[4] The evidence in this case discloses a shameful and unseemly scramble for patronage indulged in by the applicant and other motor carriers operating over this route. The rivalry among the motor carriers, apparently degenerated into an effort to put each other out of business. One witness stated that when his company got all the low rate passengers it wanted, it would send them to a competitor, evidently intending to flood his competitor with more cheap business than he could take care of. Such conduct deserves the severest condemnation. The evidence is to the effect that $7 for a one-way trip between St. Louis and Kansas City is a reasonable fare. It is inconceivable that business men could be so unmindful of good business management as to long engage in the kind of rate war disclosed by the evi-

dence. Healthy competition would have been commendable, and might have given good results to both the carriers and the public, but where competition becomes a test of endurance and a scramble for business, regardless of the rates of fare paid, or whether operating expenses are made, the public, as well as the operators engaged in the rivalry, must eventually suffer. The Commission will not tolerate such practices, but will expect the applicant and all other motor carriers to charge only the rates of fare on file with the Commission. The highways of the state of Missouri must not be converted into race tracks under a pretense of securing business, but a strict compliance with the law will be demanded.

[5] The evidence in this case shows that the protesting railroad companies have suffered a loss in the number of passengers carried and of revenue received from passengers since the advent of automobiles and good roads. That is true not only in Missouri, but throughout the Nation. The major portion of this loss is due to privately owned automobiles, but in part it is due to busses operated for hire. The greater part of the decrease in passenger business suffered by the railroad is in the short haul, but there is also a loss in the long haul.

In view of the showing made by applicant as to its financial condition, and in view of the length of time that the applicant has been engaged in the motor bus business in this and other states, the Commission is of the opinion that the applicant is financially able to continue the operation of its motor bus system in this state.

There was no showing that the time schedule or rates of fare proposed by the applicant are unreasonable, unjust, or improper. If adjustment or change in rates or time schedule should be necessary in the future, the Commission can make such adjustments or changes as may appear to be necessary, just, and proper.

The Commission is mindful of the fact that railroad transportation is necessary to the welfare of the public, and due consideration is given to transportation service being furnished by railroads and other motor carriers serving the territory of the applicant's route.

After a careful consideration of all the facts developed in this case and the law governing same, the Commission is of the opinion that the continued operation of the applicant's motor bus system over the route herein described will not have such effect upon the other carriers serving said route as to be detrimental to the interests of the public.

The Commission finds that the applicant was actually operating in good faith, rendering satisfactory and dependable service by motor vehicles on the 1st day of December, 1926. The Commission will, therefore, indulge the applicant with the presumption that such service is necessary to public convenience, in the absence of evidence overcoming such presumption, and the Commission finds that under all the facts in this case such legal presumption has not been overcome. The Commission, therefore, finds that a certificate of convenience and necessity should be granted the applicant.

An order in accordance with the views herein expressed will be issued.

Calfee and Porter, Commissioners, concur; Brown, Chairman, Hutchison, Commissioner, absent.

ORDER.

This case being at issue upon the application and answers on file, and the Commission after hearing the evidence and being fully advised in the premises, and having on the date hereof made and filed its report containing its findings of fact and conclusions thereon.

Now, upon the evidence in this case, and after due deliberation, it is:

Ordered: 1. That YellowaY, Inc. be and the same is hereby granted a certificate of convenience and necessity for the operation of the bus line between St. Louis and Kansas City, Missouri, as described in the application and blue prints filed herein, and to operate over said route ten motor busses as described in the application and evidence in this cause.

Ordered: 2. That the mileage traversed by applicant over the route described herein is found to be as follows: In the city of St. Louis 9¾ miles; over State Highway No. 40, 244.56 miles; in the city of St. Charles 1.47 miles; over U. S. Highway No. 54, 7 miles; Fulton 2 miles; Columbia 2.6 miles; Boonville 1.7 miles; Kansas City 10.50 miles.

Ordered: 3. That the time schedule and rates of fare to be charged by the applicant shall be as set forth in the application herein, and said applicant is hereby required to file same with this Commission.

Ordered: 4. That this order shall take effect ten days after this date, and that the secretary of this Commission shall forthwith serve certified copies of this report and order on all interested parties herein, and that the applicant shall, on or before the effective date of this order, notify the Commission whether the terms of this order are accepted and will be obeyed.

Note.—Commissions.

I. Jurisdiction, powers and duties:
- ***a. In general, 233.***
- ***b. Over legal matters:***
  - ***1. In general:234.***
  - ***2. To determine validity of statute, 234.***
  - ***3. Over legal questions relating to contracts and franchises, 234.***
- ***c. Over managerial questions, 235.***

I. Jurisdiction, powers and duties.

a. In general.

In Backus-Brooks Co. v. Northern P. R. Co. No. 7602, 21 F. (2d) 4, June 15, 1927, the United States Circuit Court of Appeals, for the Eighth Circuit, said: "It is well settled that the powers of a State Commission are special and limited, and they can exercise only such authority as is legally conferred by express provisions of law, or such as is by fair implication and intendment incident to and included in the authority expressly conferred for the purpose of carrying out and accomplishing the objects for which the Commission was created, and that any reasonable doubt of the existence of any particular power in the Commission should be resolved against the exercise of such power."
P.U.R.1928A.

b. Over legal matters.

1. In general.

The determination of the question whether a water utility should recover from a consumer for water lost by reason of a leaky pipe on the consumer's premises is not a function of the Commission but is for the determination by the courts. Prescott v. Camden & Rockland Water Co. (Me.) F. C. 685, Oct. 19, 1926.

Jurisdiction to enforce payment of arrearages for service is vested in the courts and not in the Commission. Kendrick v. Austin-Inland Teleph. Co. (Mo.) Case No. 5028, April 13, 1927.

In Rapid Transit Subway Construction Co. v. New York, — Misc. —, 223 N. Y. Supp. 24, April, 1927, the plaintiff subway constructor operating under a contract requiring underpinning according to the approval of the Commission's engineers had submitted plans for such work. The engineer did not believe at the time the work was necessary, but later approved the plans when the necessity became apparent. The New York supreme court disallowed a recovery by the plaintiff of the difference between the cost of the work when first suggested and when actually done, on the ground that the plaintiff was not bound by the consent of the Commission in such a matter of safety and could have gone ahead and done the work when the necessity became apparent.

In ibid the New York supreme court, in passing upon the right of the city comptroller to withhold from a utility constructor's deposit an order from the Public Service Commission ample security for claims against the city decided that such right was absolutely conditional upon the approval of the Commission, and the action of the comptroller in retaining such funds without a certificate from the Commission entitled the constructor to interest on the amount withheld.

2. To determine validity of statute.

A petition for an order requiring a railroad company to lease a warehouse site and material yard under a statute requiring it to furnish such site cannot be denied by the Commission on the theory that the statute is unconstitutional since the Commission recognizes the constitutionality of statutes until declared unconstitutional by the courts. Kenosha Sand & Gravel Co. v. Chicago & N. W. R. Co. (Wis.) R-3317, July 26, 1926; Aug. 17, 1926.

3. Over legal questions relating to contracts and franchises.

In Rapid Transit Subway Construction Co. v. New York, — Misc. —, 223 N. Y. Supp. 24, April, 1927, the plaintiff subway constructor had not followed the contract regarding certain excavations but had constructed instead according to the orders of the Pub-

lic Utilities Commission's engineer which entailed much less work and expense. The New York supreme court decided that under such circumstances the plaintiff was not entitled to receive from the city compensation for the work as contracted but only for the actual word done.

A temporary location of water mains on claims above the roadway by a subway constructor on orders from the Commission's engineer did not entitle the constructor to recover from the city pay for "laying mains in place" as per contract. Ibid.

In Backus-Brooks Co. v. Northern P. R. Co. No. 7602, 21 F. (2d) 4, June 15, 1927, commenting upon the jurisdiction of a State Commission with regard to rate contracts of intrastate carriers, the United States Circuit Court of Appeals for the Eighth Circuit, said: "Granting that a state has no right to interfere with the internal economy of a railroad farther than to secure the safety and comfort of passengers, as, for example, to fix the wages of employees or control its contracts for construction, or the purchase of supplies, it has a clear right to pass upon the reasonableness of contracts in which the public is interested, whether such contracts be made directly with the patrons of the road, or for a joint action in the transportation of persons or property in which the public is indirectly concerned."

c. Over managerial questions.

In Re Bell Teleph. Co. Case No. 955.71, Order No. 38777, Feb. 21, 1927, in passing upon a contract under which payments were made by the Bell Telephone Company of Canada to the American Telephone & Telegraph Company for services, the Canada Board of Railway Commissioners said: "There is no doubt that services of value are obtained under the contract. So long as present day business organization continues, and public utility corporations are under private ownership, the general business administration of such corporations must, of necessity, be in the hands of their directors. Of course, if they abuse their discretion and enter into improvident contracts, that is a matter which must be given full weight when it arises in connection with a hearing involving rates. In the present instance, on weighing the evidence, there is no such proof of abuse of discretion or improvidence in bargaining as would justify the Board in taking the position that the agreement should be invalidated in whole or in part. The function of the Board is one of corrective regulation, not of business management."

The Maine Commission stated that it was not its uniform policy to dictate what amounts should be adopted or established by a utility as proper allocations for the various costs of operation; that this is a managerical duty and its fullfilment in the first instance rests with the company; but in one case where only a nominal amount was paid

to an officer performing the duties of treasurer and clerk, the Commission named a higher amount at which it believed the salary should be fixed. Re Andover Water Co. F. C. 668, Sept. 4, 1926.

While the Public Utilities Commission has power to examine all books, contracts, records, documents, and papers of any public utility and by subpoena *duces tecum* to compel the production thereof, it is not required to exercise such power in a controversy between rival transportation agencies, where there is no lack of efficiency in the service nor any question of rates involved, nor the rights of the public concerned, and no fraud has intervened whereby the Commission has been deceived. Under such circumstances, the refusal of the Commission to order a production of the private accounts, books, papers, etc., of one transportation agency for the inspection of a competitor is neither unreasonable nor unlawful. Southern Ohio Pub. Service Co. v. Public Utilities Commission, No. 19800, 115 Ohio St. 405, 154 N. E. 365, Dec. 7, 1926.

PENNSYLVANIA PUBLIC SERVICE COMMISSION.

CHESTER H. ASHTON

v.

NORTHERN PENNSYLVANIA POWER COMPANY.

[Complaint Docket No. 7202.]

Discrimination — Electric rates — Demand charges — Different consumption charges.

Unlawful discrimination does not result from an electric rate schedule under which a customer by paying a higher demand charge pays a lower rate per kilowatt hour, since the circumstances and conditions of service with respect to the consumers would not be similar.

[July 12, 1927.]

COMPLAINT against an electric rate schedule alleged to be discriminatory; complaint dismissed.

By the **Commission:** The complainant, a resident of Knoxville, by complaint duly filed, alleges that the rate proposed by the respondent, designated Schedule "I" in Supplement No. 1 to tariff P. S. C. Pa. No. 3, effective April 1, 1927, is unjust, excessive, and discriminatory.

Schedule "I" is divided into two parts, (1) the demand charge, (2) the energy charge. For the first six demand units

or less the demand charge is $1.10 per month, which is increased 10 cents per month for each additional unit to and including 21 units, and 5 cents per month for each unit in excess of 21 units. An additional demand charge of $1 per horse power or fraction thereof is made for all power equipment in excess of one horse power in the connected load. The energy charge in addition to the demand charge is 6 cents per kilowatt hour for the first 30 kilowatt hours used and at the rate of 5 cents per kilowatt hour thereafter. The minimum charge is the demand charge but not less than $1.10 per month.

A rating of one demand unit is made for each wired room, excluding closets, pantries, and unfurnished attics; a rating of one demand unit will also be made for all halls and vestibules, open porches, cellars or basements, each wired stall in a private garage, each outlet in barns, poultry houses or other detached buildings and each outside lighting outlet.

Heretofore there was available but one rate for domestic service, namely, Schedule "A" which is also a two-part rate consisting of a demand charge of $1 per customer plus the energy rate of 10 cents per kilowatt hour for the first 100 kilowatt hours; 9 cents for the next 200 kilowatt hours; and 5 cents thereafter. This schedule remains in effect. Schedule "I" is, therefore, an optional rate available to those consumers who find it economical to avail themselves of its advantages.

Respondent showed that of the 2,058 residential or domestic consumers in the district to which this schedule applies 1,099, or 53 per cent, will be benefited by taking service under Schedule "I." Those who choose to continue under Schedule "A" will receive service as heretofore and have the option of changing to Schedule "I" should they alter the manner of use to make the change advantageous to themselves.

The total revenue received by the respondent for residential service in the districts to which Schedule "I" will apply was $64,222.50 per year, and at the same rate of consumption with that schedule in effect it is estimated the annual revenue will be $59,212.57, a loss of $5,009.93 per year. It is expected, however, that there will be an increase in consumption under this more favorable rate.

P.U.R.1928A.

The complainant, who is not a customer of the respondent, introduced no evidence but submitted a statement in the nature of a brief devoted entirely to the charge of discrimination which he bases on the premise that a consumer of a lesser amount of kilowatt hours with a high demand pays a greater amount on the average per kilowatt hour consumed than does a consumer with a lower demand and a greater consumption. It is evident that the circumstances and conditions of service with respect to the two consumers would not be similar and that unlawful discrimination would not result. The demand charge, otherwise known as ready-to-serve charge, was discussed by us at length in Light Committee of Lewistown v. Penn Central Light & P. Co. (1919) 7 P. C. R. 97, (anno.) P.U.R.1919B, 882, 883, where we stated in part:

"The use of a separate charge to cover stand ready costs is very general in electric power schedules and at the present time the trend is undoubtedly toward a wider use of this form of charge in gas, water, and other utilities delivering a product. The Public Service Company Law does not prohibit its use either directly or indirectly.

"There is no distinction in principle between a system of minimum payments and a system of ready-to-serve charges. Both are predicated upon the same analysis of the total cost of the service. Both recognize the element of 'Stand ready to serve.' In a schedule with minimum payment requirements, the ready-to-serve costs are concealed in the rate per unit and in the minimum. In a schedule with a pure ready-to-serve charge these costs stand revealed. . . .

"The Commission has not adopted any fixed policy in the matter of a ready-to-serve charge, even though it has in several instances, under certain conditions and circumstances approved its use. A ready-to-serve schedule can be made to follow more closely the cost of the service and hence results in a more equitable division. . . .

"The Commission further concludes that there is nothing illegal in the use of a ready-to-serve charge in a gas schedule, and that the evidence does not warrant a finding that the use of such a form of charge in this case is unjust or unreasonable, and

that there is nothing unjust or unreasonable in the division of the gross revenues as effected by the schedule under attack, except that the ready-to-serve charge should be graded in recognition of the variation in demand as evidenced by the size of the meter."

It appears from all of the facts of record that Schedule "I" as proposed will result in economies to both the consumer and the respondent. We find and conclude that it is neither unreasonable nor discriminatory. The complaint will be dismissed.

SOUTH DAKOTA BOARD OF RAILROAD COMMISSIONERS.

RE GREYHOUND COMPANY OF YANKTON.

[Order No. 1434-B.]

Public utilities — What constitutes partnership — Motor carriers.

1. An arrangement by which separate motor truck operators conduct business over separate routes, each one paying his own operating expenses and retaining all of the earnings of his own equipment, and keeping his own accounts, there being no common or partnership property, no common fund, and no sharing, either equally or proportionately, of earnings or expenses, possesses no elements of a partnership or other association which might be recognized as a legal entity, although an office equipped with a telephone is maintained in common, p. 240.

Certificates of convenience and necessity — Separate applications — Motor truck operators.

2. Various individuals cannot operate motor trucks separately, and without any sort of financial connection, under one permit or certificate of authority, and upon the payment of but one statutory fee, p. 241.

Certificates of convenience and necessity — Separate routes — Applications.

3. Each applicant for a certificate of convenience and necessity authorizing motor truck service should state definitely the route or territory for which authority is sought, and the character of the service contemplated, p. 241.

[June 17, 1927.]

APPLICATION for authority to operate as a motor carrier of property; matter held open pending the receipt of proper applications.

Appearances: Harry Kunkle, Attorney, for the applicant; W. D. Llewellyn, for the American Railway Express Company and the Chicago, Milwaukee & St. Paul Railway Company.

By the **Board:** In this case, an application was made to the Board for authority "to haul anything but livestock in the vicinity between Sioux City, Iowa, and Platte, South Dakota, starting point Yankton, S. D. (Headquarters of partnership)."

[1] The status of the applicant is stated thus: "William Frerking, Ernest Frerking, and Vern Vanderhule, all of Yankton, South Dakota, post office, partnership known as 'The Greyhound Company.'" The application is signed and verified by William Frerking, Vern Vanderhule, and Ernest Frerking and the verification states that they are "partners and all." The record discloses a rather unusual business arrangement among three or four individuals. This arrangement possesses no elements of a partnership or other association which might be recognized as a legal entity. It appears that the three individuals who signed the application and at least one other had, since February, 1927, been operating trucks for hire over the highways of the state, without compliance with chapter 224 of the Session Laws of 1925, under a very loose sort of association referred to in the record sometimes as a partnership and sometimes as "teamwork." It appears that William Frerking owns two trucks, one of which he personally operates, the other being operated by his personal employee, Holmes by name. Vern Vanderhule owns and operates one truck, and Ernest Frerking owns and operates one truck. An office equipped with a telephone is maintained in common, under the name of "The Greyhound Company," and such business as is offered by phone is handled by the individual who at the time can most conveniently render the service. Each of the three persons signing the application pays all of his own operating expenses, retains all of the earnings of his own equipment and keeps his own accounts. There is no common or partnership property, no common fund, and no sharing, either equally or proportionately, of earnings or expense.

The applicants seek to cover a wide range of territory and to provide a somewhat irregular service from Yankton to a large number of inland villages and country stores, in addition to a more or less regular service over a definite route between Sioux City, Iowa, and Platte, South Dakota, rendering on this route interstate service between Sioux City and each of the towns in

South Dakota along the so-called Platte line of the Chicago, Milwaukee & St. Paul Railway Company; also intrastate service between such South Dakota towns.

The record shows that while the so-called "teamwork" occasionally requires performance of various classes of service by the individuals concerned, there has been some semblance of regularity with respect to general routes and character of service. It appears, for example, that the activities of William Frerking are directed mainly toward furnishing a regular service between Sioux City and Yankton, the larger part of which is interstate transportation of merchandise from Sioux City to Yankton and intermediate points, and interstate transportation of produce from such points to Sioux City. The operations of William Frerking on this route do not extend westward beyond Yankton. Vern Vanderhule, generally speaking, operates the "west end;" that is to say, that portion of the Sioux City-Platte route between Yankton and Platte, handling local intrastate business between intermediate points and also handling one "leg" of through interstate business between Yankton and Platte, such through interstate shipments being transferred from one truck to the other at Yankton and each operator participating in such movement collecting for his portion of the through haul. The operations of Ernest Frerking consist largely of the distribution of the Sioux City daily newspapers to towns on the Platte line west of Yankton, which papers are transported from Sioux City to Yankton by a regularly authorized bus line. Holmes, who, as stated, is in the employ of William Frerking, appears to be a utility man, handling most of the odd jobs or irregular trips.

[2, 3] It is clear that under the law these various individuals cannot operate separately and without any sort of financial connection, under one permit or certificate of authority and upon the payment of but one statutory fee. Furthermore, it is very doubtful if one individual, firm, or corporation could, under the law, conduct such extensive operations as are proposed herein, under one certificate or permit. Chapter 224 of the Session Laws of 1925 provides that:

"No motor carrier as in this act defined, shall hereafter operate for the transportation of persons and/or property for hire on any

public highway in this state, without first having obtained from the Board, under the provisions of this act, a permit authorizing such operations," and that: "A motor carrier making application for such permit shall do so in writing, separately for each locality for which consideration is desired," and, further, that each: "such application shall be accompanied by a registration fee of $10."

It is the Board's view that a separate application should be filed by each of the individuals desiring authority to operate; that each applicant should state definitely the route or territory for which authority is sought and the character of the service contemplated and that if and when authority is granted, each operator should adhere closely to the terms and conditions of the permit.

The record herein is clearly insufficient to establish convenience and necessity for intrastate transportation between any of the towns located upon the so-called Platte line between Yankton and Platte, or between towns located on that line of the Chicago, Milwaukee & St. Paul Railroad Company between Jefferson and Yankton, and such authority should be denied.

The Board would, however, upon this record, be inclined to grant to one applicant a Class B permit authorizing an irregular service between Yankton and each of the inland towns and country stores mentioned in the record; also, upon proper application, to grant to one applicant a certificate of convenience and necessity to operate as a Class A motor carrier of property, in interstate transportation only, between Sioux City on the one hand and Yankton and intermediate points on the other hand. The Board would also be inclined, upon proper application, to grant one applicant a certificate of convenience and necessity to operate as a Class A motor carrier of property, in interstate transportation only, between Yankton and Platte. That is to say, such applicant might be granted authority to handle, between Platte and Yankton, through shipments originating at points within the state of South Dakota and destined to points without the state and vice versa. The service in the distribution of newspapers as previously performed by Ernest Frerking might, if operations were confined strictly to such service, be rendered under Class C

registration which would be accepted by the Board upon proper application accompanied by a bona fide continuing contract covering such service.

No order will at this time be entered in this proceeding but the matter will be held open pending the receipt of such applications as are indicated above, in the event that any or all of the parties hereto desire to file separate applications in harmony with our suggestions. In such event appropriate action will be taken.

It may not be out of place for the Board to again direct the attention of the parties hereto to the provisions of the motor carrier act quoted above, to the effect that it is unlawful for any person, firm, or corporation to operate in the transportation of persons or property for hire on any highway in this state, without first having obtained from the Board a certificate or permit authorizing such operation; and to § 22 of the act which prescribes a penalty for violation thereof.

Note.—Public utilities.

I. What constitutes a public utility:
a. In general, 243.
b. Tests of status, 244.
c. Character of company, 245.
II. What constitutes public service, 245.
III. Corporate procedure, 245.

I. What constitutes a public utility.

a. In general.

In Tyson & Brother v. Banton, No. 261, — U. S. —, — L. ed. —, 47 Sup. Ct. Rep. 426, Feb. 28, 1927, the United States Supreme Court held that places of amusement or entertainment are not public utilities so affected with public interest as to justify a legislative regulation of their charges. Mr. Justice Sutherland, delivering the opinion of the court, said: "A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business; and while the word has not always been limited narrowly as strictly denoting 'a right,' that synonym more nearly than any other expresses the sense in which it is to be understood. The characterizations in some decisions of businesses as 'quasi public' (People v. King, 110 N. Y. 418, 428, 18 N.

E. 245, 1 L.R.A. 293, 6 Am. St. Rep. 389, 'not "strictly" private' (Aaron v. Ward, 203 N. Y. 351, 356, 96 N. E. 736, 38 L.R.A.(N.S.) 204), and the like, while well enough for the purpose for which they were employed, namely, as a basis for upholding police regulations in respect of the conduct of particular businesses, cannot be accepted as equivalents for the description 'affected with a public interest,' as that phrase is used in the decisions of this court as the basis for legislative regulation of prices. The latter power is not only a more definite and serious invasion of the rights of property and the freedom of contract, but its exercise cannot always be justified by circumstances which have been held to justify legislative regulation of the manner in which a business shall be carried on. . . . The significant requirement is that the property shall be devoted to a use in which the public has an interest, which simply means, as in terms it is expressed at page 130 [of 94 U. S., 24 L. ed. 77] that it shall be devoted to 'a public use.' Stated in another form, a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby, in effect, *granted* to the public."

In ibid., Mr. Justice Sutherland said: "The mere declaration by the legislature that a particular kind of property or business is affected with a public interest is not conclusive upon the question of the validity of the regulation. The matter is one which is always open to judicial inquiry."

b. Tests of status.

A statutory motor carrier class for those who transport oil or its products under a contract fixing the remuneration and the service and who do not serve the public generally, applies to a motor carrier transporting and delivering gasoline and other oil products for an oil company over the public highways outside of any municipal limits, the truck being owned by the operator and the tank thereon by the company, the operator paying the operating expenses and receiving a commission based on the number of gallons sold which commission is not added to the price of the commodity but paid by the company. Re Griffin (S. D.) Order F-1101, Sept. 24, 1926.

The application of a statutory provision that a motor carrier class should embrace those who transport oil or its products under a contract fixing the remuneration and the service and who do not serve the public generally, to the operations of a motor carrier of gasoline under a contract with a single company does not make the operator a common carrier, since the mere fact that the statute extends to the operations of private carriers does not make the operation of such a carrier that of a common carrier. Ibid.

e. Character of company.

In Maryland v. Rubin, Sept. 29, 1927, the defendants were charged with operating without permit a "hiring car" over a route established by the Public Service Commission. The traffic court of Baltimore City, after reviewing a rule of the Commission which made it unlawful for such a car to operate over an established route except in so far as might be incident to its ordinary business of "hiring,"—pointed out that the various changes of routes effected by the defendants were only evasions to maintain their classification as a "hiring car" and avoid the obligation of a "common carrier" while reaping the benefits thereof.

A township telephone line is a municipal line within a statutory definition of a telephone company which includes municipal lines, and is, therefore, required to obtain a certificate for construction in territory served by existing lines. Re Lake Shore (Minn.) M-1634, Nov. 27, 1926.

II. What constitutes public service.

The legislature cannot by fiat convert a private carrier into a common carrier. State v. Smith, No. 647, — Ariz. —, 252 Pac. 1011, Feb. 7, 1927.

Whether a spur or industrial track is one of "public use" does not depend upon the number of people whom it accommodates, but rests upon the fact that every one who has occasion to use it may of right do so; and, if such track is opened to the public, to be used on equal terms by all who may at any time have occasion to use it, so all persons can demand that they be served without discrimination, and not by permission merely, and if such track is subject to governmental control under general laws, and in the same manner as are the main lines of a railroad, then the use is a public one. (a) It is not essential, in order to make the use of a spur or industrial track a public one, that its use should be opened to all the public, but a facility or instrumentality of transportation may be limited in its use. Tift v. Atlantic Coast Line R. Co. 161 Ga. 432, 131 S. E. 46, Dec. 18, 1925.

III. Corporate procedure.

Under Act No. 144 of Public Acts of 1909 as amended by Act No. 381 of Public Acts of 1919, the Commission has no power to approve articles of association to engage in the business of common carriage of passengers upon the public highways. Re West Side Transit Co. (Mich.) D-2242, Nov. 26, 1926.

The creation of a financially irresponsible common carrier of passengers would not be approved by the Commission, if it had the power to approve the articles of association. Ibid.

SOUTH DAKOTA BOARD OF RAILROAD COMMISSIONERS.

RE JAMES R. LEWIS.

[No. 1078-A.]

RE FRED J. McLAREN.

[No. 1136-A.]

Certificates of convenience and necessity — Preference between applicants — Financial responsibility.

1. Proper consideration of the factor of financial responsibility need not mean that where two or more applicants for the same route have shown sufficient responsibility, the surplus degree of financial resource should be controlling, p. 247.

Certificates of convenience and necessity — Preference between applicants — Priority — Automobiles.

2. All other necessary requirements being equally satisfied, the Commission decided that a certificate of convenience and necessity, as between two applicants for the same route, should be awarded to one who had begun legalized operation four months prior to the other, p. 248.

[October 14, 1927.]

ORDER on rehearing granting a certificate of convenience to an applicant for a motor route and refusing another applicant; confirmed. For earlier case see P.U.R.1927D, 329.

Appearances: Rice & Rice, Attorneys, for Fred J. McLaren, petitioner; Warren & Lloyd, Attorneys, for James R. Lewis, respondent.

By the **Board:** James R. Lewis and Fred J. McLaren, both of Flandreau, filed their separate applications with the Board for certificate of convenience and necessity to operate as a Class A motor carrier, in the transportation of property, between Flandreau and Sioux Falls, via Egan, over State Highways 11, 35, and 15. Mr. Lewis' application was filed on July 2, 1926 and Mr. McLaren's on July 30, 1926. Separate hearings were held upon these applications and on March 18, 1927, the Board, having considered the records jointly, issued a joint report and by order of even date granted the application of James R. Lewis and denied the application of Fred J. McLaren, in P.U.R.1927D, 329. In due course a certificate of public convenience and ne-

cessity, No. 89-A, was issued to Mr. Lewis April 1, 1927, authorizing the proposed operations.

Within the time limited by statute the applicant McLaren filed a petition for rehearing. On April 8, 1927, the Board issued an order granting a rehearing and, pursuant to due notice to all interested parties, such rehearing was held at Flandreau on May 4, 1927. Subsequent to such hearing, attorneys for the petitioner requested time within which to file a brief or memorandum.

The only grounds stated in the petition for rehearing which we consider material are as follows:

"(4) The opinion (of the Board) gives no consideration to the wishes of the large percentage—in fact about two-thirds—of the business men of Flandreau and does not consider the past record of the applicant for efficiency in the operation of a truck business as asked for.

"(5) That said opinion gives no consideration as to the financial responsibility and standing of the respective applicants. That in fact the applicant James R. Lewis is financially embarrassed and not situated with equipment with financial means and credit to operate as a Class A motor carrier regularly and efficiently between Flandreau and Sioux Falls, or at least that such ability does not compare favorably with the ability to so do as shown by the applicant McLaren."

Upon rehearing, the only testimony offered by the petitioner was that of the petitioner himself and of his son. No shippers were called by the petitioner and no testimony was offered on behalf of the petitioner tending to show that any user of motor carrier service between Flandreau and Sioux Falls was dissatisfied with the service furnished by Mr. Lewis. On the other hand, several shippers were called by the respondent Lewis, all of whom testified that they had used his service extensively and had found it to be reliable, dependable, and generally satisfactory.

[1] It clearly appears from the entire record that both of the applicants are in a position to render efficient and satisfactory service; that there is no necessity for the establishment of more than one motor carrier agency upon the route involved herein; that the shippers generally have no decided preference as between

the two applicants; and that while one of the applicants is unquestionably in better financial circumstances than the other, either is possessed of sufficient financial means and credit to enable him to provide all equipment and labor necessary to satisfactorily handle the normal volume of traffic.

The Board should, of course, give due consideration to the financial responsibility of all applicants for authority to operate as motor carriers, to the end that ample facilities and efficient service may be assured to the public, but proper consideration of this factor does not necessarily mean that where two or more applicants for the same route have shown sufficient responsibility, the degree of financial ability should of itself be controlling.

[2] As stated in the original report herein, § 14 of chapter 224 of the Session Laws of 1925 contains the following directions for the guidance of the Board:

"If a conflict should arise between carriers desiring to operate over the same route, where public convenience and necessity is shown, due consideration shall be given by the Board to the length of time that any applicant has been in business, the kind and character of service rendered, and the amount of capital invested."

From the record herein and the files of the Board, it clearly appears that the respondent, James R. Lewis, began operations as a legalized motor carrier of property upon the issuance of a permit by the Board early in the year 1923, under the provisions of chapter 124 of the Session Laws of 1923. Upon the passage of chapter 224 of the Session Laws of 1925, Mr. Lewis promptly made application under the provisions of that act and a Class B permit was issued to him July 7, 1925. The petitioner, Fred J. McLaren, began legalized motor carrier operations upon the issuance to him of a Class B permit November 10, 1925.

The supreme court of the state of Ohio in a recent decision in the case of Johnson v. Public Utilities Commission, — Ohio St. —, P.U.R.1927E, —, 157 N. E. 475, held that where two transportation companies were qualified to receive a certificate of convenience and necessity to operate as a motor carrier over a certain route and public convenience and necessity warranted the granting of a certificate, the action of the Public Utilities

Commission in granting a certificate to one of the two would be affirmed since where the Commission did not abuse its discretion in making such selection its finding and order in that respect was neither unreasonable nor unlawful. The court pointed out, in this case, that the motor transportation act had for its object the securing of necessary and convenient motor transportation to the public and that the rights conferred upon the recipient of a certificate of convenience and necessity were only such as were incident to the accomplishing of such object and were granted primarily for the benefit of the public and not for the benefit of the recipient of the certificate.

A careful review of the entire record convinces the Board that the original order herein made and entered on the 18th day of March, 1927, *supra,* should be in all respects confirmed.

WISCONSIN RAILROAD COMMISSION.

RE STATE TELEPHONE COMPANY OF WISCONSIN.

[U-3562.]

Discrimination — Telephone rates — Free interexchange service.

1. Free toll service between telephone exchanges is a form of discrimination in rates that should be discontinued, p. 252.

Rates — Telephones — Tolls — Standard rate.

2. The standard toll rate in effect in the major portion of a state should be put in effect by an independent telephone company as well as a statewide company, assuming that the standard of service is identical, p. 252.

Rates — Reasonableness — Cost of service.

3. The Commission must establish reasonable rates based upon the cost of the service, p. 254.

Rates — Telephones — Local pay station.

4. A rate of 5 cents per call at a local pay station of a telephone company was approved, p. 254.

[July 18, 1927.]

APPLICATION for authority to increase telephone rates; application granted with modification.

P.U.R.1928A.

By the **Commission:** This application was filed with the Commission April 5, 1927.

Hearing was set for April 29, 1927, at the office of the Railroad Commission. Acceding to the petition of a number of interested parties the time and place for the hearing was changed to May 3, and later to May 4 at the village hall in Reedsville.

Appearances: Sanborn, Blake & Aberg, by Mr. Blake; John A. Pratt, secretary and treasurer of the company, for the petitioner; Arnold F. Rush, Village President, H. C. Angle, Freight Service Inspector, Chicago & North Western Green Bay; F. H. Meaney, appearing for himself; W. H. Damn, Rockland Telephone Company, Collins; R. J. Roopke, representing Whitelaw subscribers, Whitelaw; Rev. Casey, also representing village of Whitelaw, for the subscribers.

This application concerns the Reedsville and Whitelaw exchanges of the State Telephone Company.

The lawful rates of the applicant now in effect at these exchanges are as follows: [Schedule omitted.]

Company now provides free service for its subscribers connected at Reedsville and Whitelaw with the subscribers of the Manitowoc exchange of the Wisconsin Telephone Company by means of free trunk lines between the villages of Reedsville and Whitelaw and Manitowoc.

The company's proposed rates are as follows:

Company proposes no change in exchange service rates.

Miscellaneous Service

Service stations switched per year	$9.50

Toll Rates

Permission is requested to eliminate all free service between the exchanges at Whitelaw and Reedsville and Manitowoc and to place in effect the standard toll rates authorized by the Railroad Commission of Wisconsin in its order dated February 24, 1927.

Local pay stations—per call	$.05
Service connection charges—	
Single or party line	3.50
Extensions	3.50
Local installation, equipment in place except telephone	2.00
Rural installation, equipment in place except telephone	3.50

The above service connection charges to be refunded to subscribers providing service is retained at the same exchange for a period of two years.
P.U.R.1928A.

Move Charges

Local inside moves or changes in type of equipment or class of service	$1.50 net
Local outside moves or changes in type of equipment or class of service	2.00 "
Rural inside or outside moves and changes in type of equipment	3.00 "

Billing and Discount Rule

Subscribers shall be billed for the current month at the gross rate and when gross and net rates are quoted the difference between the gross and the net rate will be allowed as a discount on all bills paid on or before the 20th of the month for which the bills are rendered. After the 20th of the month the gross rate will apply.

Restoring of Service

When a subscriber's telephone is disconnected for nonpayment the subscriber will be required before service is restored to pay a reconnection charge of $1 in addition to paying all indebtedness.

Application for Service Initial Period

Application for service where service connection charges apply shall be taken for an initial period of one month and may be cancelled upon ten days' written notice at the expiration of the initial period. Application for service requiring the extension of physical equipment exceeding ¼ of a mile of pole line in addition to existing facilities may be taken for a period of three years if the cost of furnishing the service justifies such a period.

Petitioner contends that the revenues under the present schedule of rates are insufficient to pay operating expenses and to provide for depreciation and a return on the investment in plant and equipment.

At the time of the hearing the company submitted a table showing the investment in property and plant assigned to switching service amounting to $1,601.33. The engineering department of the Commission, after a careful study of the bases of apportionment and of unit prices and depreciated values, found a value of $1,436 for the property devoted to switching service.

According to testimony there are 245 subscribers connected at the Reedsville exchange and 119 of these are switched for the Rockland Telephone Company.

The company has submitted a table showing unit operating costs amounting to a total of $9.515 per switched subscriber per year.

The application requested a rate of $9 per year but this was amended at the hearing to provide a rate of $9.60 per year to cover the cost of service as shown in the following table of operating expenses, submitted by the company:

State Telephone Company of Wisconsin
Reedsville Exchange
Unit Cost for Subscribers Connected but Not Owned—Annual Basis.

Total property and plant assigned as per details	$1,601.33
Total number of subscribers at Reedsville	245
Number of subscribers connected but not owned	119

Expenses directly assigned except operator's wages.

	Total Cost.	Per Unit.
Maintenance less depreciation	$64.88	.545
Depreciation at 5%	80.07	.672
Operators wages	1,344.00	5.485
Heat, light and rent	60.00	.504
Commercial	57.60	.480
General	46.74	.389
Taxes	42.84	.360
Interest on investment at 8 per cent	128.11	1.080
Total cost per unit		$9.515

A careful study of the different items of expense leads us to believe that, in the main, the company's operating expense statement is a correct statement of the cost of furnishing switching service. However, the commercial expense of .48 per unit to cover the cost of billing for toll calls is not a proper charge to this service. The toll rate is designed to cover this expense. The Commission's valuation, somewhat below that used by the company in computing depreciation and return will also reduce the cost of service.

From all available information it appears that a switching rate of $9 per customer per year will just about meet the cost of this service and is, therefore, a reasonable rate. The Rockland subscribers have in the past enjoyed an unusually low rate and a rate that we feel convinced did not cover the cost of the service they received.

[1, 2] The toll situation in this case is an unfortunate one. The company's subscribers have enjoyed unlimited service between Reedsville and Whitelaw exchanges and also with the Manitowoc echange of the Wisconsin Telephone Company. Calls originating at the Manitowoc exchange and terminating at Reedsville or Whitelaw, however, were on a toll basis. The Rockland switched subscribers, connected at Reedsville, enjoyed unlimited service to subscribers of the Reedsville and Whitelaw exchanges but the standard toll rate of the Wisconsin Telephone Company applied on calls through to Manitowoc.

There are three physical circuits from Whitelaw to Manitowoc, one of these extending through to Reedsville. The Wisconsin Telephone Company has a toll circuit from Manitowoc to Reedsville. Out of the Whitelaw board are served a few small communities such as Branch, Cato, and Grimms.

From the testimony it was apparent that these lines are not giving adequate service under the present conditions.

The following traffic study was made by the company and submitted as evidence in this case.

State Telephone Company of Wisconsin
Traffic Exhibit
March 29, 30, and 31, 1927.

Reedsville—Whitelaw—Manitowoc Traffic

	Whitelaw to Manitowoc.	Reedsville to Manitowoc.	Manitowoc to Reedsville.	Manitowoc to Whitelaw.
March 29	209	32	5	25
March 30	156	27	4	16
March 31	186	40	6	24

Reedsville—Whitelaw Traffic

	Reedsville to Whitelaw.	Whitelaw to Reedsville.
March 29	12	30
March 30	7	19
March 31	13	40

Petitioner contends that the majority of these calls are not necessary business calls, as evidenced by the number of calls originating at Reedsville and Whitelaw for Manitowoc enjoying unlimited service, compared with the number of calls in the opposite direction requiring a toll payment.

The distance between Reedsville and Whitelaw is 7.1 miles; between Whitelaw and Manitowoc 9.2 miles; and between Reedsville and Manitowoc 16.3 miles. We do not believe that the situation presented here warrants the free use of more than 16 miles of toll line, and unlimited service between the subscribers of three exchanges. Just and reasonable rates must be based on the cost of the service. Toll service is a particular class of service that is not used uniformly by all exchange subscribers. Those who obtain this service should be required to pay for it.

Applicant has requested permission to place in effect the

standard toll rate of the Wisconsin Telephone Company. This is the same schedule that is now in effect for interstate toll service on the Bell system and for intrastate service in about three-fourths of the states.

We know of no reason why the cost of furnishing toll service should not be as great for any given standard of service, to an independent telephone company as to the Wisconsin Telephone Company and, assuming that the standard of service is identical, there is no reason related to the cost of service why the rates should not also be identical.

[3] Free toll service is a form of discrimination in rates. It provides an additional class of service for those who need it without requiring them to pay the cost of the service. In the present case, it appears that the company has had to stand this additional cost since, even including the additional revenue to be derived from the proposed switching rate and standard toll rate, the company's return on the investment amounts to no more than 5 per cent. There has been considerable opposition to the company's proposed switching rate and abandonment of unlimited service and we have carefully considered the points involved and all the facts and information available. It is the duty of the Commission to establish reasonable rates based on the cost of the service and our investigation leads us to believe that the company's proposed rates will do no more than meet this cost and are, therefore, reasonable and just.

[4] The proposed rate of 5 cents per call at local pay stations and the installation charges subject to refund appear to be reasonable charges and will be allowed by this order. The move charges are a reduction of the present filed move charges and will be allowed. The proposed rules covering discounts and applications for service we feel are reasonable.

OKLAHOMA SUPREME COURT.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

v.

STATE et al.

[No. 16936.]

(— Okla. —, 258 Pac. 874.)

Certificates of convenience and necessity — Judicial interpretation of necessity — Automobiles.

1. Where the existence of public convenience and necessity is a prerequisite to the authorization of a motor carrier to furnish services, as required by § 4, chapter 113, Session Laws of Oklahoma, 1923, the word "necessity" means a public need, without which the public is inconvenienced to the extent of being handicapped in the pursuit of business or wholesome pleasure, or both—without which the people generally of the community are denied, to their detriment, that which is enjoyed by other people generally, similarly situated, p. 259.

Appeal and review — Presumption of reasonableness of Commission findings.

2. On appeal from an order of the Corporation Commission issuing a certificate of public convenience and necessity to operate a motor bus over the public highways, if there is any evidence reasonably tending to support the order of the Commission, the prima facie presumption of the order's being reasonable, just, and correct obtain by reason of § 22, article 9, of the Constitution, and the burden is upon appellant to overcome that presumption, p. 261.

Certificates of convenience and necessity — Evidence of necessity — Presumption favoring Commission finding.

3. Evidence examined, and held, that evidence is sufficient to support the order of the Corporation Commission, p. 262.

Certificates of convenience and necessity — Burden of proof to rebut Commission findings.

4. Evidence examined, and held, appellant's evidence insufficient to overcome the prima facie presumption of the reasonableness, justness, and correctness of the order appealed from, p. 262.

[July 19, 1927.]

Headnotes by the COURT.

APPEAL by railroad carrier from an order of the Corporation Commission granting certificate of convenience and necessity to motor bus carrier; affirmed.

Appearances: W. R. Bleakmore, John Barry, and A. T.

Boys, all of El Reno, and W. F. Collins, of Oklahoma City, for plaintiff in error; Clark Owsley, of Oklahoma City, for defendant in error Corporation Commission; George F. Short, Attorney General, and William L. Murphy, Assistant Attorney General, for the state; Simons, McKnight & Simons, of Enid, for defendant in error Red Ball Bus & Baggage Company.

Jeffrey, C.: The Red Ball Bus & Baggage Company, a corporation, filed its application with the Corporation Commission under chapter 113, Session Laws of Oklahoma 1923, and rule 11 of Order No. 2219 of the Commission, asking for a certificate of public convenience and necessity to operate a motor bus as a common carrier of passengers over and upon the public highways from Enid, Oklahoma, to El Reno, Oklahoma, by way of Waukomis, Bison, Hennessey, Dover, Kingfisher, and Okarche, paralleling the railroad of the Chicago, Rock Island & Pacific Railway Company. The railway company filed a written protest to the issuance of said certificate, setting out in substance that all of the towns reached on said proposed bus line were regular stations on its railroad; that adequate facilities were provided for the receipt and delivery of passengers, sufficient for the transportation of the traveling public; and that there was no necessity for the establishment of a motorbus line over said route. The railway company appeared at the hearing on said application and offered evidence against the issuance of said certificate. After taking testimony in support of and against said application, the Corporation Commission on the 7th day of July, 1925, made certain findings and issued its order granting a certificate of public convenience and necessity to said applicant, from which findings and order the plaintiff in error, the Chicago, Rock Island & Pacific Railway Company, has appealed to this court.

Five assignments of error are presented, but are briefed under one specification of error, to wit:

"The order of the Corporation Commission is not supported by sufficient evidence."

That portion of the findings and order of the Corporation Com-

mission which is complained of and with which we have to deal is as follows:

"(1) That the applicant is engaged in the business of the transportation of passengers for compensation upon and over the highways of the state of Oklahoma, and as such is within the jurisdiction of the Commission as is provided by chapter 113, Session Laws of Oklahoma 1923.

"(2) That the said applicant has substantially complied with the requirements of said chapter 113, Session Laws of Oklahoma 1923, and with Rule 11 of Order No. 2219 of this Commission, governing the filing of applications for certificates of convenience and necessity, authorizing the operation of motor vehicles over the highways.

"(3) That the Chicago, Rock Island & Pacific Railroad Company operates passenger service between said termini.

"(4) That the applicant has executed and filed with this Commission liability insurance policy for the sum of $5,000 for any one person injured and $10,000 for protection against injury or other results of any one accident and $1,000 for protection of property against damage due to accident, and that applicant has filed with the Commission a satisfactory bond in the penal sum of $100, conditioned on the payment of all fees, taxes, or charges which may be due the state of Oklahoma.

"(5) That convenience and necessity are shown by the evidence in support of the application herein to justify and require the issuance of a certificate of convenience and necessity to the said applicant for the operation of a motor vehicle as a motor carrier."

The evidence upon which the above findings and order was made is substantially as follows: C. E. Mehew, president and manager of the Red Ball Bus & Baggage Company, testified that he was engaged in the taxi and baggage business at Enid; that he was financially able to operate the bus line; that the train schedule from Enid to El Reno and Oklahoma City over the plaintiff in error's road was insufficient and inconvenient for quite a few people in Enid and in the small towns along said route between Enid and El Reno; that there was no train service from Enid south to El Reno between the hours of 1 o'clock

A. M. and 11 o'clock A. M.; that by his proposed schedule the bus would leave Enid at 7 A. M., make all of the small towns, and arrive in El Reno at 10 A. M.; that he had talked with a great number of the people in all of the towns along said proposed route; and that every one that he had talked with desired the establishment of the bus line. H. W. Manning testified that he was proprietor of the Oxford Hotel, the principal hotel in Enid; that he heard a great deal of complaint about the train service from Enid south, the most of this complaint being from traveling salesmen; that two of the trains between Enid and El Reno each way did not stop at Waukomis, Bison, Hennessey, Dover, and Okarche; that the proposed bus schedule would permit one from the north to make earlier connections at El Reno for Oklahoma City, and thus permit them to make the trip to Oklahoma City and back in much less time; and that public convenience and necessity demanded the issuance of the permit. Then a resolution of the Chamber of Commerce of Enid was introduced, setting forth that the train schedule of the Chicago, Rock Island & Pacific Railway was not adequate to meet the demands of the traveling public for the reason that the first train of each day was too early, and the second train was too late for the convenience of the public, and stated that public convenience and necessity demanded the issuance of a permit to operate the proposed bus line. Two additional petitions signed by more than 100 persons, residents in the towns along said proposed route, stated that there was a necessity for the operation of a motor carrier over the proposed route and asking for the issuance of the certificate.

The contestant offered its time-tables in evidence, which are as follows:

El Reno to Enid:

Train No.	Leave El Reno.	Arrive Enid.
18	3:50 a. m.	5:20 a. m.
22 daily (ex. Sun.)	9:00 a. m.	11:00 a. m.
24	4:00 p. m.	6:00 p. m.
32	7:45 p. m.	9:30 p. m.
Local freight	7:00 a. m.	11:15 a. m.
	(Leaves from El Reno yard.)	

Enid to Oklahoma City (via El Reno):

Leave Enid.	Arrive Okla. City.
About 1:00 a. m.	——
11:00 a. m.	2:25 p. m.
4:00 p. m.	7:15 p. m.
9:30 p. m.	12:00 a. m.

P.U.R.1928A.

The evidence further shows that one of the five trains each way between Enid and El Reno is a local freight and that its time of arrival at the stations along the route is somewhat indefinite depending upon the amount of business on each haul, and that two trains each way only stop at Kingfisher between Enid and El Reno, and only two passenger trains each way stop at Waukomis, Bison, Hennessey, Dover, and Okarche, leaving El Reno at 9 A. M. and 4 P. M. respectively, and arriving in Enid two hours later. The first train leaving Enid after 1 A. M. is at 11 A. M. and stops at all stations between Enid and El Reno. The evidence does not disclose which southbound train is the second local train. There is further evidence to the effect that the reason for not stopping the four passenger trains is that sufficient people do not travel on the trains at the small stations to justify the stops, and, further, that the railway company is furnishing such service as it deems necessary and is able to furnish such service to the traveling public as is needed. Several persons testified that the train service was good and adequate, and no necessity existed for the bus line. The proposed schedule of the bus line is to leave Enid at 7 A. M., stop at all intermediate stations and arrive at El Reno at 10 A. M., leave El Reno at 1 P. M., stop at all intermediate stations, and arrive at Enid at 4 P. M. The evidence in this case, both in support of the application and in opposition thereto, is somewhat unsatisfactory, is rather meager, and consists principally of generalities and conclusions, rather than a narration of the facts necessary to enable this court to best determine the reasonableness and justness of the order.

[1] What constitutes such a public convenience and necessity as would warrant the issuance of a certificate to a motor carrier under the act? And what shall be the measure of the exercise of the powers of this court when reviewing the orders of the Corporation Commission granting or denying such certificates? The first question, while a new one was recently passed upon by this court in the case of Chicago, R. I. & P. R. Co. v. State, 123 Okla. 190, 252 Pac. 849, and will be referred to more particularly hereafter. It will be necessary to inquire what meaning the legislature intended to give to the expression in the light of the whole act, and to refer to the judicial construction thereof,

and to the construction of similar acts. Section 4 of the act reads, in part, as follows:

"It is hereby declared unlawful for any motor carrier to operate or furnish service within this state without first having obtained from the Corporation Commission a certificate declaring that public convenience and necessity require such operation. The Corporation Commission shall have power, and it shall be their duty after public hearing, to issue said certificate as prayed for or to refuse to issue the same. . . ."

The act deals with three subjects: Motor carriers, public highways, and the public. The legislature is not interested in the motor carriers, except in so far as they desire to use the public highways for private gain, and to serve the public. The public highways, of course, are built for the benefit of the public. So the principal party to be benefited by the act is the public. By the act it is not intended to promote competition between and among common carriers, but, on the other hand, it is intended that common carriers, railroads, and motor carriers alike should receive a fair measure of protection against ruinous competition, with a view that the public may be better served. It has never been the policy of legislatures to enact legislation for the benefit of individuals or classes of individuals, except so far as the same would directly affect the public interest. In attempting to define or limit the term "necessity," as used in the act, we must deal with something to which the public is entitled. In the case of Chicago, R. I. & P. R. Co. v. State, *supra,* and in the second syllabus thereof this court said:

"In the statute requiring the issuance of a certificate of public convenience and necessity as a prerequisite to the operation of a motor carrier, the word 'necessity' is not used in the sense of being essential or absolutely indispensable, but in the sense that the motor vehicle service would be such an improvement of the existing mode of transportation as to justify or warrant the expense of making the improvement. It should be made to appear that the inconvenience of the public occasioned by the lack of motor carrier transportation is so great as to amount to a necessity."

This definition is somewhat ambiguous and uncertain as to its

scope and meaning. In the first place, the two parts thereof appear to be contradictory. In the first part of the definition it is said that "necessity" is not used in the sense of being essential or absolutely indispensable, and in the last part it is said that the inconvenience of the public occasioned by the lack of motor carrier transportation should be so great as to amount to a necessity. If the word "necessity" in the last part of the definition is used in its ordinary sense, the definition is too harsh. The supreme court of Illinois, in construing the expression in an act similar to ours in the case of Wabash, C. & W. R. Co. v. Commerce Commission ex rel. Jefferson S. W. R. Co. 309 Ill. 412, P.U.R.1924A, 548, 553, 141 N. E. 212, said:

"When the statute requires a certificate of public convenience and necessity as a prerequisite to the construction or extension of any public utility, the word 'necessity' is not used in its lexicographical sense of 'indispensably requisite.' If it were, no certificate of public convenience and necessity could ever be granted. The first telephone was not a public necessity under such a definition, nor was the first electric light. Even the construction of a waterworks system in a village is seldom necessary, though highly desirable. However, any improvement which is highly important to the public convenience and desirable for the public welfare may be regarded as necessary. If it is of sufficient importance to warrant the expense of making it, it is a public necessity."

Necessity, as here used, could not mean indispensable which is the more common meaning of the term. While a condition might arise where motor transportation of this sort might be indispensable to an individual or several individuals, such could never be the case with the public. A much less urgency will meet the requirements. As used in this connection, "necessity" means a public need, without which the public is inconvenienced to the extent of being handicapped in the pursuit of business or wholesome pleasure, or both—without which the people generally of the community are denied, to their detriment, that which is enjoyed by other people generally, similarly situated.

[2] Keeping in mind the meaning of the expression of public convenience and necessity, is the order of the Commission sup-

ported by the evidence? There is no rule of law better settled in this jurisdiction than in cases on appeal from the Corporation Commission the prima facie presumption of the order's being reasonable, just, and correct obtained by reason of § 22, art. 9, of the Constitution, if there is any evidence reasonably tending to support the order of the Commission. The burden upon appeal in this court is then upon appellant to overcome that presumption by pointing to some evidence in the record which rebuts the evidence relied on. Atchison, T. & S. F. R. Co. v. State, 28 Okla. 476, 114 Pac. 721, and other cases therein cited. There has been no deviation from this rule by this court. Chicago, R. I. & P. R. Co. v. State, 123 Okla. 31, 251 Pac. 1044; Atchison, T. & S. F. R. Co. v. State, 23 Okla. 210, 100 Pac. 11, 21 L.R.A. (N.S.) 908; Atchison, T. & S. F. R. Co. v. Miller, 28 Okla. 109, 114 Pac. 1104; Missouri, K. & T. R. Co. v. State, 24 Okla. 331, 103 Pac. 613.

[3, 4] It is true that the evidence upon which the order is based is not entirely satisfactory, but this is necessarily true to some extent by reason of the character of proof attempted. The evidence shows that between the hours of 1 A. M. and 11 A. M. there is no public conveyance from Enid to El Reno, and that it is proposed to operate a bus leaving Enid at 7 A. M., stopping at all intervening towns and arriving at El Reno at 10 A. M. The evidence further shows that between the hours of 9 A. M. and 4 P. M. there is no public conveyance from El Reno to Enid, and that under the proposed bus schedule a bus will leave El Reno at 1 P. M., stopping at all intervening stations and arriving at Enid at 4 P. M. The evidence discloses that there is a great deal of complaint about the train service; that it is difficult to go from Enid and other towns along the proposed route to Oklahoma City without the loss of a great deal of time. So there is some very pertinent evidence which tends to support the order and findings, and, when accompanied with the prima facie presumption by reason of § 22, art. 9, Oklahoma Constitution, this court will not disturb the order of the Commission, unless it appears from the record that such presumption has been overcome. Chicago, R. I. & P. R. Co. v. State, *supra;* Atchison, T. & S. F. R. Co. v. State, *supra;* Wabash, C.

& W. R. Co. v. Commerce Commission ex rel. Jefferson S. W. R. Co. *supra.*

To set aside an order of the Corporation Commission as being unjust, unreasonable, or arbitrary, it is not sufficient for this court to think the order unwise. It is within the province of the Corporation Commission to pass upon the wisdom of the proposed undertaking by a public utility. That Commission is presumed to be peculiarly experienced and fitted for that purpose, and, having seen and heard the witnesses, and being in possession of data and information not obtainable by this court, it would be unwise to give the orders of the Commission any less recognition. To do otherwise would place the ultimate decision in every case with this court, and substitute the findings of this court for that of the Corporation Commission.

Plaintiff in error calls our attention especially to the following authorities: Chicago, R. I. & P. R. Co. v. State, 123 Okla. 190, 252 Pac. 849; Ex parte Tindall, 102 Okla. 192, 229 Pac. 125; West Suburban Transp. Co. v. Chicago & W. T. R. Co. 309 Ill. 87, P.U.R.1923E, 150, 140 N. E. 56; Choate v. Illinois Commerce Commission, 309 Ill. 248, 141 N. E. 12; Wabash, C. & W. R. Co. v. Commerce Commission ex rel. Jefferson S. W. R. Co. 309 Ill. 412, P.U.R.1924A, 548, 141 N. E. 212.

In the case of Chicago, R. I. & P. R. Co. v. State, *supra,* the court said there was no evidence of a lack of facilities from station to station at the time of the application, and no competent evidence to support the order directing the issuance of a certificate of public convenience and necessity. Based on the record, as recited, we think the conclusion reached is correct, but to the extent indicated above—that is, with reference to the definition of a public necessity—that opinion is hereby modified. The Tindall Case, *supra,* involves a habeas corpus proceeding in which the motor carrier act was challenged as being unconstitutional. The court in a very exhaustive opinion sustains the constitutionality of the act, and, with reference to the phase with which we are dealing, said:

"Where the exercise of powers conferred upon the Corporation Commission by an act is conditioned upon the actual existence of a public necessity, and the findings as to such necessity

is subject to review by a judicial tribunal of authorized jurisdiction, the Commission is thereby shorn of arbitrary or capricious powers, should it in any instance attempt to exercise such powers."

That is, unquestionably, a correct statement of the law as applied to this case, so far as it goes. In the case at bar we are confronted with the inquiries, what constitutes a necessity as intended by the act, and, under the settled rule of this court, is the evidence sufficient to support the order, or is the order arbitrary and capricious?

An examination of the decisions of the supreme court of Illinois above referred to discloses that they are by no means in accord as to what extent the powers of review of that court should be exercised with reference to orders of the Commerce Commission on appeal. While the facts in the West Suburban Transportation Case, *supra,* distinguishes it from this case, it is apparent that the court does not indulge the presumption to the orders of the Commerce Commission to which the orders of the Corporation Commission are entitled in this state. The same is to an extent true in the Choate Case, *supra.* In the case of Wabash, C. & W. R. Co. v. Commerce Commission ex rel. Jefferson S. W. R. Co. *supra,* a newly organized railway company applied to the Commerce Commission for a certificate of public convenience and necessity to construct a short road to a coal deposit for the purpose of assisting in the opening and developing of a coal mine. This was the chief reason for the issuance of the certificate. The proposed road paralleled three existing roads and no point to be served by it was more than four miles from a railroad, and the application was contested by the existing roads as in this case. On the question before us the court said:

"Perhaps it is questionable whether the development of such a mine is a matter of public convenience and necessity. In some communities it is regarded so, and we are not prepared to say that the Commerce Commission had no substantial evidence on which to find it so." (P.U.R.1924A, at p. 553.)

There are two lines of decisions from that court. One is based upon the expediency or wisdom of the findings of the Commis-

sion, and the other indulges a prima facie presumption in favor of the orders of the Commission, that they are reasonable, just, and correct when supported by any evidence reasonably tending to support the same. There being some evidence reasonably tending to support the order of the Corporation Commission, and having examined appellant's evidence, we are unable to say that the prima facie presumption of the reasonableness and justness of the order of the Commission has been overcome.

The order of the Corporation Commission is affirmed.

Bennett, P. C., and Herr, Diffendaffer, and Hall, CC., concur.

Per Curiam. Adopted in whole.

CALIFORNIA RAILROAD COMMISSION.

JOHN W. ANDERSON

v.

UNITED PARCEL SERVICE OF SAN FRANCISCO.

[Decision No. 18119, Case No. 2155.]

Public utilities — What constitute — Contract auto carrier — Package delivery.

1. A company delivering packages for department stores under special contract is not engaged in the business of a common carrier, p. 266.

Certificates of convenience and necessity — Jurisdiction of Commission — Private carriers.

2. The Commission has no jurisdiction to restrain motor carrier service without a certificate when such service is rendered by a private carrier, p. 266.

[March 29, 1927.]

COMPLAINT against alleged illegal operation by a motor carrier company; complaint dismissed.

Appearances: Edward R. Solinsky, for complainant; Devlin and Brookman, by Douglas Brookman, for defendant.

By the **Commission**: Complainant herein, John W. Anderson, a common carrier of property by automotive power, oper-

ating under authority of a prescriptive right established prior to May 1, 1917, seeks from this Commission an order requiring the United Parcel Service of San Francisco, a corporation, defendant herein, to cease and desist from delivering packages or other property at certain points in Marin county.

Complainant alleges that the defendant is conducting, without authority from this Commission, a common carrier business for the delivery of packages in Sausalito and other points in Marin county served by complainant, and that the business so conducted by said defendant, unless prohibited, will impose "irreparable damages" on complainant.

Defendant in its answer filed herein alleges in substance that it is engaged in the business of transporting property, but only as a private carrier performing service under private contract, and that none of its operations are subject to the jurisdiction of this Commission. Defendant further denies that any of the business conducted by it is of such character as to bring it within the jurisdiction of this Commission.

Upon the issues thus joined, a public hearing was conducted by examiner Williams at San Francisco, the matter was duly submitted and now is ready for decision.

[1, 2] In support of the complaint, John W. Anderson, complainant, operating under the fictitious name of the Sausalito-Mill Valley-San Francisco Express, testified that since early in August, 1925, he had met vehicles bearing the name of the United Parcel Service traversing the roads in Marin county, and had noticed the delivery of packages at various points from these vehicles. Complainant testified that he had been engaged in the business of transporting property between Marin county and San Francisco for the past fifteen years; that during the greater portion of this period he had made Marin county deliveries for San Francisco department stores (including Hale Brothers) and other firms; that on August 1, 1925, Hale Brothers transferred all their shipments to the defendant herein, and that since that time complainant had not enjoyed this business, which he estimated was worth $250 a month gross income to him. Complainant further testified as to the equipment which he owns and devotes to public service, also as to commodity rates provid-

ed for package service, and as to his ability to perform all the service necessary as a public carrier between San Francisco and the points now served by him in Marin county.

Complainant called to the stand J. E. Casey, president of the defendant corporation. Mr. Casey testified that the United Parcel Service sent its vehicles into Marin county to make deliveries of packages under private arrangement entered into August 1, 1925, with certain department stores in San Francisco. He further testified that the defendant corporation was organized as a private carrier and incorporated as such in the spring of 1925, for the particular purpose of entering into a joint contract with the city of Paris, O'Connor, Moffett & Company, Hale Brothers and the Emporium, all department stores in San Francisco, under which contract defendant assumes all the package delivery service for each and all, within and without the city of San Francisco. He further testified that this contract enabled each of the department stores to abandon its own package delivery service and rely upon the contractual arrangement made with defendant to supply such service. In support of this testimony, witness introduced, as defendant's Exhibit No. 1, the articles of incorporation of the United Parcel Service of San Francisco. Mr. Casey testified that the contractual relation with the four department stores named was such that the business could not, without great difficulty and the consent of all parties concerned, be enlarged to include any other service, and that the defendant did not hold itself out to carry packages for any others that those named in the contract, and had not performed any service for others.

Mr. Casey, recalled in behalf of defendant, testified that the additional business of Magnin & Company and Livingston's had been offered to defendant, but had been declined because of the private nature of the contract with the four department stores named and lack of their consent to an enlargement. Complainant was insistent that this contract be placed in evidence, but defendant was not required to produce it, for the reason that when the demand was made, complainant had produced no testimony in support of the material and essential allegations of his complaint, other than the physical presence in Marin county of ve-

hicles bearing defendant's name, and delivery of packages therefrom.

Complainant herein seeks to enjoin the operation of defendant on the ground that defendant is performing, without valid authorization, common carrier service over routes and to points now served by complainant. In his testimony Mr. Casey explained in detail how service is given in the area affected, admitting that all deliveries are made for the four houses with which defendant has a contract in substantially the same manner as any common carrier would perform the service. He testified that the plant of this corporation and all its equipment, valued at more than $100,000, were constructed and established and are maintained solely for the purpose of performing package delivery service for the four stores named, and that such deliveries are made wherever required to be made, not only in Marin county but in other counties, as well as in the city of San Francisco. There is no dispute, therefore, as to the fact that defendant is actually making deliveries, as alleged by the complainant, in territory served by complainant as a common carrier. The question is whether complainant has shown affirmatively that the service thus performed by defendant is that of a common carrier and subject to regulation by this Commission.

Defendant's Exhibit No. 1 (its articles of incorporation) shows that defendant corporation was organized and incorporated for the purpose of conducting the business of a private carrier, and it is specifically provided in the second paragraph of said articles of incorporation that "in exercising any of the powers hereinabove enumerated, this corporation shall not have the power and shall not engage in the business of a common carrier."

After a careful examination of the evidence herein submitted, we cannot find that it has been affirmatively shown that defendant has, by any act, engaged in the business of a common carrier; on the contrary, we believe the testimony shows conclusively that the business heretofore done by this defendant has been done strictly in the performance of its contract with the four department stores named herein, and for them only. In view of the recent decision of the United States Supreme Court in the case of Frost v. California R. Commission, 271 U. S. 583, 70 L. ed.

1101, P.U.R.126D, 483, 46 Sup. Ct. Rep. 605, holding that this Commission has jurisdiction only over common carriers (operating between fixed termini or over a regular route), and not over private carriers, and in view of the failure of the complainant to show any service of a common carrier nature performed by defendant, we must find that the questions of defendant are those of a private carrier, over which this Commission has no jurisdiction. Upon this finding an order will be entered dismissing the complaint for lack of jurisdiction.

IDAHO PUBLIC UTILITIES COMMISSION.

RE MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY.

[Case F-627, Order No. 1100.]

Rates — Reasonableness — Value and cost of service — Telephones.

1. In establishing just and reasonable rates, the cost of service to the utility and the value of service to the consumers must be duly considered, p. 271.

Rates — Reasonableness — Value of telephone service — Factors.

2. In determining the value of telephone service to the subscriber, the size of the exchange, the number of subscribers, business and resident, the density of population, the size, character, saturation, and economical condition of the territory served, and the nature of use made of service are all elements to be considered, p. 272.

Discrimination — Concessions to municipalities — Free telephone service.

3. Free service to a municipality is an unlawful discrimination and should be discontinued, p. 272.

Discrimination — Concession to business phones — Free service.

4. Unexplained free service to business phones is an unlawful discrimination and should be discontinued, p. 272.

[September 24, 1927.]

APPLICATION for permission to increase telephone rates; increase ordered.

Appearances: H. R. Risley, Boise, representing Mountain States Telephone & Telegraph Company; J. E. Graham, H. J. Flamm, Fred Maynard, and F. D. Turner, representing the protestants.

By the **Commission:** On the 30th day of October, 1926, the Mountain States Telephone & Telegraph Company, a public service corporation operating a general telephone business in Rexburg and vicinity, in Madison county, state of Idaho, filed with this Commission a certain tariff containing telephone exchange rates for the Rexburg (Idaho) exchange, to become effective December 1, 1926.

On October 11, 1926, a protest of numerous residents of Rexburg and vicinity (subscribers of said Rexburg exchange) was filed with this Commission against said tariff becoming effective.

Said tariff has been suspended by orders of this Commission until September 27, 1927.

After due notice given the matter came on regularly for hearing at Rexburg, Idaho, on the 19th day of August, 1927, at 10:30 A. M. At said hearing the parties were represented as above stated. Oral and documentary evidence was introduced on behalf of the company, and oral testimony on behalf of the protestants.

It appears from the evidence that the Mountain States Telephone & Telegraph Company, operating at Rexburg and vicinity, Madison county, Idaho, has a telephone exchange at Rexburg, Idaho, serving approximately eight hundred ten stations, which is a component part of the general telephone system of the Mountain States Telephone & Telegraph Company in Idaho.

The only issue in this hearing is a proposed raise of rates on individual line business from $4.50 to $5 per month.

It appears from the evidence adduced at said hearing that the company is not making from the operation of its properties in Idaho sufficient revenues to pay over and above operating expenses, taxes and depreciation the return allowed by this Commission in Order No. 756 (P.U.R.1921B, 739) on the value of its used and useful property in public service, as of the date of said order.

The Rexburg exchange at present serves eight hundred ten stations, of which approximately one hundred twenty-two stations are single line business phones. Said exchange has a very liberal "free talking" area covering a territory of approximately 16 miles in width and 27 miles in length. In said territory

there are eleven well defined communities; such as Lyman, Archer, Sunny Dell, Thornton, Independence, Burton, Hibbard, Plano, Salem, Sugar City, and Moody Creek.

The business telephone subscriber in the Rexburg exchange has a flat rate, by payment of which each subscriber is allowed unlimited use of his phone through said exchange, and may use the service made available to all of said territory at the regular monthly rental.

The operating expenses, including taxes, uncollectible revenues, and depreciation, for the year ending May 31, 1927, as shown by Exhibit B, is $26,558.72, and for the year ending May 31, 1926, is $26,727.57. The revenues received from the operation of said exchange for the year ending May 31, 1927, is $24,549.33, and for the year ending May 31, 1926, is $23,-264.67. Deducting from $26,558.72, the operating expenses, etc., for the year ending May 31, 1927, the company's claim for depreciation on the depreciable property of said exchange of $8,794.01, leaves $17,764.71.

In said Exhibit B the company claims $144,440.47 as the present value of the used and useful property of said exchange. The company computed this value by taking the Commission's valuation fixed as of August 31, 1919, and added thereto the cost of the net additions to the property in the exchange. This may not represent the value of the property used and useful in said exchange at the present time; however, taking a value of half the claim of the company, which unquestionably would be a low value to place on said property, and deducting from the said revenues received for the year ending May 31, 1927, the operating expenses and taxes for the same period, would leave a balance of $6,784.62, which would not be sufficient to pay the exchange's equitably fair share of depreciation and a fair return on said low value of the used and useful property of said exchange.

[1] Rates fixed and established by regulatory bodies must be just and reasonable. Rates to be just and reasonable must be just and reasonable both to the consumer, or patron, and the company. In the fixing and establishing of just and reasonable rates the cost to the company in rendering the service or in mak-

ing the service available, as the case may be, and the value of such service rendered or made available to the subscriber must be considered.

[2] In the case of a telephone utility the property which the company operates is that which is used and useful in making available the service for its subscribers. In determining the cost to the telephone company in making available the service the value of the company's property used and useful, the depreciation accruing to such property so used in providing such service, the expenses of operation and taxes, must be considered. In determining the value of the service made available to the subscriber the size of the exchange, the number of subscribers, the density of the population, the size and character of, and the economic conditions existing in, the territory served, the number of residence phones, the number of business phones, the saturation of the territory, and the nature of the use made of such service are elements which must be considered.

The record discloses that economic conditions in the territory served by the Rexburg exchange are improved. That the territory is recovering from the financial depression which has existed for some years and the return toward normalcy is apparent.

Upon a consideration of the said elements of value of the service provided to the business phone subscriber and the cost to the company in making the service available at the Rexburg exchange, the Commission is of the opinion that the said exchange should yield more revenue than it is doing at present from its single line business telephones, and that the present rate of $4.50 per month for single line business phones should be increased to $5 per month.

[3, 4] The evidence discloses that the city of Rexburg and two business telephones at Sugar City are each receiving free telephone service. This constitutes a discrimination and is in violation of the law, and should be discontinued.

The Commission finds:

1. That the revenues received from the Rexburg (Idaho) exchange, for the year ending May 31, 1927, including the exchange's share of the tolls for said period, is $24,549.33, and the expenses of operating said exchange and taxes for said period,

exclusive of the company's claim for depreciation of $8,794.01, is $17,764.71, leaving a balance of $6,784.62 to cover depreciation and return on the value of the used and useful property of said exchange.

2. That $6,784.62, the remainder left after subtracting the operating expenses and taxes from the revenues received from the operation of said Rexburg exchange for the year ending May 31, 1927, is not sufficient to pay the exchange's fair share of depreciation and a fair return on an unquestionably low value of the used and useful property of said exchange, under all the conditions and circumstances.

3. That the rate of $4.50 per month for a single line business telephone at Rexburg (Idaho), upon a consideration of all the elements of value of said telephone service and the financial returns of the company's operation of said exchange, and the economical conditions at the present time in said territory served by said exchange, is unreasonable.

4. That the rental rate of $5 per month for a single line business telephone at Rexburg, Idaho, under all the facts and conditions as they exist in said territory as disclosed by the record, is a just and reasonable charge for a single line business telephone for the Rexburg (Idaho) exchange.

5. That the company has been furnishing the city of Rexburg and two business phones at Sugar City with free telephone service. This constitutes discrimination and is in violation of the law, and should be discontinued.

INDIANA PUBLIC SERVICE COMMISSION.

RE NORTHERN INDIANA POWER COMPANY.

[No. 9063.]

Rates — Electricity — Active-room basis — Experiment authorized.

1. A proposed schedule of active-room optional electric rates was made effective over a trial period of time and a public hearing for consideration of experience with these schedules set, p. 277.

Rates — Test period — Active-room schedule — Cost of optional billing.

2. In authorizing an experimental period for a proposed active-room rate by an electric utility, charges for service were ordered to be set out upon billings both for old and optional service, and a verified and separate account of extra cost for billing was ordered, same to be presented at a later hearing to decide the result of the experiment, p. 277.

Rates — Room rate — Electric utility — Commission attitude.

Discussion of Commission's lack of sympathy with a proposed active-room rate, p. 278.

[August 13, 1927.]

APPLICATION of electric utility for permission to install optional electric rates on active-room basis; application allowed and future determinative hearing set.

Appearances: Fesler, Elam & Young, by J. W. Fesler; Bowers, Feightner & Bowers, by Bowers & Feightner, Huntington, S. C. Kivett, Martinsville, Glen Van Auken, Indianapolis, for Northern Indiana Power Company; Wiley & Carlson, Huntington, E. O. King, Huntington, Lesh & Krieg, by Mr. Krieg, Huntington, for citizens and city of Huntington.

Singleton, Chairman, **Harmon,** Commissioner: When the preliminary optional electric rates were offered for filing, the Commission took the same under consideration to determine whether said rates should be approved as offered. The citizens of Huntington began inquiry as to the nature of the rates proposed, for the reason that the proposed rates constituted a new form of rate schedule. As a result of these inquiries, and as a result of some argument being offered against the adoption of rate schedule as offered for filing, the Commission decided to hold public hearing in the city of Huntington upon the question of approval. Accordingly, formal notice was mailed to parties in interest as far as known to the Commission, and notice of public hearing was published as required by law. Formal notice was as follows:

"Public Service Commission Docket No. ——.

In re optional electric rates offered by the Northern Indiana Power Company applicable to the city of Huntington, Indiana.

"Notice is hereby given that the Public Service Commission of Indiana will conduct public hearing in the above entitled cause, in the court house at Huntington, Indiana, at 10 o'clock A. M., August 9, 1927.

"Public participation in this hearing is requested by the Commission.

"*Public Service Commission of Indiana*
By F. T. Singleton, Chairman,
Indianapolis, Indiana, July 25, 1927."

Agreeable to legal notice given, a public hearing was held in the court house at Huntington, Indiana, at 10 o'clock A. M. August 9, 1927.

At the beginning of the hearing, Mr. Krieg of counsel for objectors offered written cross petition and remonstrance in the name of Mark H. Thomas, in which objectors prayed:

"That said new and proposed schedule of rates be not approved; that this Commission make an investigation of all matters that enter into the costs of electrical energy to the consumers of Huntington, and for all other relief."

Said motion in full is hereby made a part of this record in this cause, the same as if reproduced herein in full.

Mr. Bowers, in behalf of the utility, filed written motion to strike out remonstrance and cross complaint.

The theory of this motion was that the above petition and motion "tenders a collateral issue and is not germane to the issue in the above entitled cause."

The motion to strike out also alleged that said petition was not signed by any person or corporation or by any organization or individual authorized by law to sign same, etc.

The hearing Commissioners held that the cross petition and remonstrance, if sustained, would have the effect of converting the hearing into a general rate hearing; that the result would be to sustain a collateral effort to introduce a rate hearing, and would be a departure from the purposes of the hearing in the instant case as set forth in the notice of hearing reproduced above.

Therefore, the motion to strike out was sustained.

At this point, the utility offered to assume the burden in the

hearing, and to introduce evidence in support of the form and the steps of preliminary optional rate schedule offered for filing on July 1, 1927. Objectors to said schedule agreed that this might be done, and the hearing proceeded according to this plan.

The first witness was K. F. Dickinson, manager for the Northern Indiana Power Company for the Huntington district. By this witness was introduced Exhibit "A" which was intended to show the rate schedule in existence and the optional preliminary rate schedule proposed, and was intended to show that the proposed schedule of rates and charges would be, in all respects, a saving to the patrons of the utility in the Huntington district. While said figures were questioned, they were not disputed or controverted successfully. By the same witness, was introduced Exhibit "B" which was intended to show the estimated reduction in residence and commercial electric revenues that would have resulted if the proposed optional electric rates had been in effect during twelve months, ending July 1, 1927. This exhibit and the figures therein were not controverted successfully.

The next witness was Carl D. Jackson, general counsel for the National Electric Light Association, who was introduced as an expert witness as to the most scientific and most modern form of electric rate schedule applicable to service, as the rate schedule in the instant case proposed to be. The hearing Commissioners were not convinced that the testimony presented through Mr. Jackson as witness was properly applicable to the case before them, but permitted his testimony to be heard, and permitted him to be cross examined for the purpose of being informed by his testimony, if found to be applicable, but not for the purpose of considering his testimony in this cause, unless the Commission should conclude that it was applicable.

The Commission is of the opinion that Mr. Jackson's testimony did not in any wise aid in determining whether the proposed schedule of rates and charges would affect the patrons of the Huntington district, favorably or unfavorably.

The next witness was Vernon Tallman of Boston, Massachusetts, who was introduced also as an expert witness. Witness is manager of the commercial and electric department of Charles Tenny & Company of the state of Massachusetts, and was pre-

sented as an expert in rate making. The pertinence of his testimony was questioned, and this question was followed by considerable argument offered by counsel, pro and con. Following the argument, the hearing Commissioners excluded Mr. Tallman's testimony on the ground that it did not tend to show that the proposed rate would affect the patrons of this utility of the Huntington district, favorably or unfavorably. The result of this ruling was that several expert witnesses brought by the utility from distant states were excluded from offering testimony. At this point, the utility rested its case.

The objectors offered no testimony, stating that they had expected to proceed in this cause in accord with cross petition and remonstrance filed by them in the beginning of the proceedings, and, therefore, had not entered into detailed preparation of evidence to be offered at the time of the hearing.

During the progress of the hearing, a question had been raised as to the minimum charge that would result if permission should be granted for the proposed rate schedule to be made effective. The proposed schedule offers a net monthly minimum charge of $1. The existing schedule provides for a monthly minimum charge of $.50. In order to clarify the apparent conflict in this respect, the utility proposed, and the objectors assented that a stipulation be offered covering that point. Consequently, the following stipulation was offered by Mr. Van Auken of counsel for the utility, and said offer was accepted by counsel for the objectors.

Stipulation.

[1–2] "It may be stipulated that the Northern Indiana Power Company during the preliminary period of the operation of this rate, if it be authorized by the Commission, will keep in full force and effect the present domestic lighting rate and present commercial lighting rate and that those customers whose consumption amounts to less than $1.10 gross and $1 net will remain on the old rates or the rates now in effect, both the domestic lighting and the commercial rates. That is to say the billing of every consumer will be computed and if it is less under the present rate, he will be charged that lesser sum. If the new rate effects a

saving to him, he will be given the new rate. Is that clear? Therefore, the $.50 minimum charge now in effect remains in effect until the Commission has a formal hearing which would be necessary to change it. We are attempting, Mr. Commissioner, and we will make an effort to carry out what we stipulated."

One reason for public hearing was that the proposed optional schedule of rates would increase the monthly minimum charge from $.50 to $1 net. The above stipulation results in eliminating said increase, and renders it possible under the law to permit the proposed schedule to be made effective, providing no other objection be found to it.

Throughout the preliminary consideration and throughout the hearing, the tenor of discussion was that the proposed schedule would be on trial, and that such trial would determine whether it should be permitted to become effective as a permanent rate. The trial of the proposed rate schedule did not seem necessary for the benefit of the utility, because it is presumed to have determined that the proposed schedule would be just and equitable before offering it for filing. Therefore, the trial of said schedule must essentially and primarily be for the purpose of ascertaining whether the proposed form of schedule and rates set forth herein would be beneficial, just, and equitable to said patrons. Assuming this to be true, and in accord with evidence introduced, rulings made as indicated in previous paragraphs of this order, the Commission finds:—

1. That the evidence introduced in public hearing justifies a trial of the proposed schedule of rates in the Huntington district, although no member of this Commission is in sympathy with the active-room basis form of schedule.

2. That the trial of such schedule should be for a definite period.

3. That public hearing upon such said schedule should be held at the end of such trial period in order that the experience resulting from its operation may be made available to aid and determine whether such schedule as presented, or in modified form, would be just and equitable if permitted to be made a permanent schedule.

4. That the patrons are entitled to a minute study of this schedule in operation during the trial period.

5. That, therefore, each patron is entitled to know each month whether his bill for service rendered would be affected and how affected by the operation of the proposed schedule as compared with the existing schedule.

It is therefore *ordered* by the Public Service Commission of Indiana that preliminary optional residence service rate, Supplement No. 6 to P. S. C. I. No. E–2, and the preliminary optional commercial rate, Supplement No. 7 to P. S. C. I. No. E–2, and the preliminary optional commercial rate, Supplement No. 8 to P. S. C. I. No. E–2, all offered for filing on July 1, 1927 by the Northern Indiana Power Company, all intended when offered to be applicable in the Huntington district, and be "effective on billings made from meter readings taken after July 1, 1927," and the same are hereby approved as a preliminary optional electric rate schedule to become effective on billings made from meter readings taken after August 15, 1927, except that the minimum charge provided in the proposed schedule shall be applicable only in accord with the stipulation thereon as agreed upon by the parties, and as set forth in a preceding part of this order.

It is *further ordered* that the schedule authorized by the preceding paragraph, to be made effective, shall remain in effect until further order of this Commission, and that public hearing upon the result of the operation of this schedule, shall be held in the court house at Huntington, Indiana at 9 o'clock A. M., Tuesday, December 6, 1927, for the purpose of determining whether said schedule shall have justified its existence.

It is *further ordered* that the Northern Indiana Power Company, be, and it is, hereby directed to designate upon the bill rendered monthly for service to each patron, what the charges for service would be under the provisions of the existing schedule, and what the charges will be under the optional schedule hereby authorized to be made effective.

It is *further ordered* that the Northern Indiana Power Company, be, and it is, hereby directed to keep a separate account of any extra cost incurred by compliance with the preceding par-

agraph, and to present the same, verified, at public hearing ordered above.

It is *further ordered* that the patron shall have the choice to elect whether he will pay for service according to the provisions of the existing schedule, or according to the provisions of the optional schedule as qualified by the stipulation agreed upon.

All concur.

Note.—Rates.

I. Jurisdiction of the courts, 280.
II. Jurisdiction of the Commissions, 280.
III. Reasonableness, 281.
IV. Franchises and contracts, 282.
V. Rate schedules, 282.
VI. Kinds or classes, 282.
VII. Rates of particular utilities:
a. Gas, 282.
b. Railroad, 283.
c. Telephone, 285.
d. Water, 287.

I. Jurisdiction of the courts.

The United States Circuit Court of Appeals for the Eighth Circuit, in Backus-Brooks Co. v. Northern P. R. Co. No. 7602, 21 F. (2d) 4, June 15, 1927, made the following ruling regarding the originality of the jurisdiction of the state and interstate Commissions over joint intrastate and interstate carrier rates respectively: "We, therefore, conclude that the District Court was without jurisdiction to fix divisions of joint rates between the Minnesota Company and the other carriers involved for the future, and because the preliminary question of what is a just, reasonable, and equitable division of joint interstate rates had not been determined by the Interstate Commerce Commission, and of joint intrastate rates had not been determined by the Minnesota Railroad and Warehouse Commission, it was also without jurisdiction to award damages on account of divisions of such joint rates in the past."

II. Jurisdiction of the Commissions.

In Re Perry-Hollandale Teleph. Co. U-3572, Aug. 26, 1927, the Wisconsin Commission prohibited a practice of various telephone companies in adjusting their switching assessments at an annual meeting. The Commission said: "The former policy of determining the switching rate annually must be discontinued since the public

utility law provides that any change in rates must meet the approval of the Commission before being placed in effect."

Commenting upon the original jurisdiction of the state Commission to determine intrastate joint carrier rates, the United States Circuit Court of Appeals, for the Eighth Circuit, in Backus-Brooks Co. v. Northern P. R. Co. No. 7602, 21 F. (2d) 4, June 15, 1927, made the following observations: "The reasons which require preliminary resort to the Interstate Commerce Commission and a determination by it of what is a proper division of a joint interstate rate before judicial relief can be had on account of unjust, unreasonable, and inequitable divisions in the past apply with equal force where the question of divisions of intrastate rates are involved, and it logically follows that before the complainant could secure judicial relief on account of past intrastate divisions, it was necessary for it to first apply to the Railroad and Warehouse Commission of the state of Minnesota, and have the preliminary question of what is a fair division of the rates involved first determined by that Commission."

Holding that under applicable provisions in General Minnesota Statutes, 1923, the State Commission received by implication the right to fix division of joint intrastate rates, the United States Circuit Court of Appeals, for the Eighth Circuit, said: "it is clear that by § 4700 the legislature intended to grant comprehensive powers to the Commission to fix and establish joint rates. But, neither this section nor, so far as we have been able to discover, any other section of the present statutes defining and fixing the powers of the Commission, expressly authorizes it to fix divisions. However, without the power to fix divisions the power to establish joint rates would be incomplete and ineffectual. The carriers by refusing to agree as to divisions could greatly delay if not defeat the effect of an order fixing a joint rate. The fixing of each carrier's share is really a part of the establishing of a joint rate. Until the division is fixed the rate for practical purposes is incomplete." Ibid.

III. Reasonableness.

In Moline Consumers Co. v. Chicago, R. I. & P. R. Co. No. 16682, Sept. 8, 1927, the Illinois Commission found unreasonable and discriminatory rates on the movement of sand and gravel by the defendant carriers between various Illinois points. In ordering a reduction of rates and a reparation to the shippers of excess already acquired, the Commission made the statement: "As has heretofore been pointed out, competition is one of the important elements and appears to be controlling in many instances. Nevertheless, distance is also one of the factors to be considered and we are of the opinion that it might properly be given consideration in determining the rates from Ottawa, Illinois."

IV. Franchises and contracts.

A contract between a utility company and a patron with respect to rates having been abrogated by a Commission order fixing higher charges, a provision in the agreement that questions arising thereunder shall be submitted to arbitration is without force. Niagara, L. & O. Power Co. v. Seneca Iron & Steel Co. 128 Misc. 335, 219 N. Y. Supp. 418, Dec. 7, 1926.

V. Rate schedules.

In Wendel v. American R. Express Co. Docket I. & S. 989 (1), Report & Order No. 1495, Oct. 6, 1927, the complainant resisted the action of the respondent express utility in changing the classification of his product commonly called "cookies" a flat thin wafer of baked dough with a hole in the center and weighing 1 ounce from "cake-rates" to "articles of food." The Montana Commission, after reviewing etymological and lexical authorities to the unanimous effect that a "cookie" was a form of "cake" decided that there was no reasonable basis for the distribution urged by the express company and ordered a revision accordingly. The Commission said: "In construing the official classification, we are to be guided by the familiar canons of interpretation. Terms used therein must be construed in their ordinary sense—the sense in which they are generally understood, and neither carrier nor shipper will be permitted to urge for their own purposes a strained or unnatural construction. A classification sheet is put before the public for general information; it is supposed to be expressed in plain terms so that the ordinary business man can understand it."

A consumer who has a contract fixing rates for utility service has no right to notice of the proceeding for the filing of schedules with the Commission fixing higher rates, aside from the publication required by statutes upon notice to the Commission. Niagara, L. & O. Power Co. v. Seneca Iron & Steel Co. 128 Misc. 335, 219 N. Y. Sup. 418, Dec. 7, 1926.

VI. Kinds or classes.

In Re Yorktown Water Works Co. No. 8874, Aug. 26, 1927, the Indiana Commission modified a rate increase sought by the petitioning water utility upon finding that operating losses were due in a large measure to great waste of water by patrons under the old rates. A moderate increase of rates was ordered with metered service and a hearing set for subsequent determination of the reasonableness of the same.

VII. Rates of particular utilities.

a. Gas.

In Re Muskegon Traction & Lighting Co. D-1350, Sept. 14, 1927, P.U.R.1928A.

the evidence having shown the load on the applicant's gas plant to be less during the winter than during the summer, the Michigan Commission was of the opinion that the additional sale of gas for house-heating purposes might be profitably assumed by the company during the winter months, and it approved an "Optional House-Heating Rate" offered by the utility.

b. Railroad.

In Re Dearborn, Decision No. 18734, Application No. 13698, Aug. 18, 1927, the California Commission authorized carriers to publish charges for ice supplied to less than carload shipments delayed in unloading at destination points.

In Pacific States Butter, Eggs, Cheese & Poultry Asso. v. Southern P. Co. Decision No. 18587, Case No. 2230, July 8, 1927, the California Commission ordered that the defendant carriers should provide in Perishable Protective Tariff for transportation of dairy products and dressed poultry between points in California on the "cost-of-ice basis." The Commission stated: "After a careful consideration of all the facts of record we are of the opinion and find that the present practice of defendant carriers in requiring the shippers of butter, eggs, cheese, and dressed poultry in carload lots under refrigeration to pay either the stated refrigeration charges as set forth in § 2, or the charges in addition to the cost of ice and salt as set forth in Rule 241 of Protective Tariff No. 3, C. R. C. No. 2, is unjust and unreasonable and in violation of §§ 13 and 19 of the Public Utilities Act."

In Lumberman's Co. v. Seaboard Air Line R. Co. No. 18292, — Ga. —, 139 S. E. 116, July 27, 1927, the court of appeals of Georgia reversed the superior court and allowed lumber shipper to recover excess rates paid to a carrier for shipments weighing more than the minimum (24,000 pounds) fixed by the Public Service Commission. The carrier had interpreted the "minimum" carload weight as the "maximum" also and had charged "per 100 pounds" rates for the weight in excess on all carloads. The Georgia court said that the Commission had not fixed any "specified carload weight" and until it did a shipper could put any amount of lumber in a car over the minimum that he was able to load.

In an action by a railway carrier to recover a balance alleged to be due as undercharges on the intrastate transportation of 31 carloads of wheat and the products milled in transit therefrom, the record and pertinent freight rate schedules considered, and held to support plaintiff's cause of action and the judgment based thereon. Missouri P. R. Co. v. Red Star Milling Co. No. 26914, — Kan. —, 251 Pac. 417, Dec. 11, 1926.

In Seaboard By-Product Coke Co. v. Atlantic City R. Co. (N. J.)

Aug. 31, 1927, railroad carriers were ordered to base their rates on coke transportation on the shortest mileage from plant to destination through established junction points of the carriers regardless of whether or not such junction points had previously been used for movement of coke from certain localities.

In Mt. Gretna Brownstone Co. v. Pennsylvania R. Co. (Pa.) Complaint Docket No. 7280, Sept. 27, 1927, the sand-lime brick manufactured by the complainant was ordered to be carried at common brick rates upon proof that a competitive manufacturer was receiving common brick rates on the identical commodity and that there was no reason for the product to be charged at any higher rate.

In Mitchell Chamber of Commerce v. Chicago, M. & St. P. R. Co. Order F-1094, I. C. C. No. 18561, Sept. 1, 1927, a flat rate of $3.60 per car for interchange of carload shipments in connection with intrastate movements was found reasonable and ordered by the South Dakota Commission.

In Re Green Bay & Western R. Co. R-3301, Sept. 22, 1927, the Wisconsin Commission refused the application of a carrier to lower its rate for intraplant switching upon a showing that rates filed by other carriers more nearly approximated the actual cost and were more proportionate to the usual rates for such service throughout the state. The Commission said: "From the evidence and the testimony the Commission is inclined to believe that the observation period was somewhat below normal in so far as the cost is concerned. The Commission is not satisfied that a period of study of such short duration is a proper criterion of a year's business, especially in a situation such as the one here under investigation, where the intraplant movements are of different types, some relatively simple and others rather involved, the number of movements is so seasonal, and the class of locomotive used has such a bearing upon the cost as well as the time of the operations. In order to arrive at a cost more nearly representative, the study should extend over a considerably longer period or be made for different periods during the year to take care of the seasonal variation. . . . In lieu of a more detailed and more representative showing of the cost of intraplant operation the Commission is of the opinion that the findings of the carriers are not far from the actual cost of the operation. It is convinced, certainly, that the cost more nearly approximates $3 than $2. In view of the fact that the rate of $3.15 for intraplant switching is almost universally applied, it appears reasonable for the sake of uniformity to allow that rate to become effective on the Green Bay, by proper tariff filing and publication."

The Wisconsin Commission refused the application of a carrier to lower rates for intraplant switching, holding that where intraplant switching movements may involve only one or several movements P.U.R.1928A.

of the car used, which might be at hand or distant from the loading place, it was erroneous for the applicant operator to compute an analogy between intraplant movements and placement or terminal movements as a basis for assessing charges to other carriers by using as a divisor in arriving at the quotient cost per car, the number of movements; that is, by counting a car going into the plant as one car and the same car coming out as another. Ibid.

The Wisconsin Commission was of the opinion that where it is the normal practice of a plant to float its buoyant commodities when the rivers are open instead of transporting them on cars, an observation conducted for rate tests by a carrier during such period will more nearly represent the actual traction cost, as compared with the estimate of another carrier not recognizing such element. Ibid.

c. Telephone.

The Florida Commission, in Re Southern Bell Teleph. & Teleg. Co. File No. 4329, Order No. 902, April 6, 1927, approved the following changes in toll rates: "Introduction of reversed charge privilege on station-to-station calls. (1) Reversal of charges on station-to-station calls will be permitted at station-to-station day, evening, and night rates of 25 cents or more, when 'anyone' answering accepts the charges. Reversal of charges will also be permitted on station-to-station day, evening, and night rates of 20 cents under the same conditions as stated above, except that the rate for such calls will be 25 cents. (2) When the charges are not accepted at the called station, and the calling party is unwilling to pay the charges for completing the call, the regular person-to-person report charge will be assessed against the calling party. (3) This service to be available over routes where person-to-person service is offered, but not to be offered on exclusive station-to-station routes."

In Re A. & M. Teleph. Co. No. 9029, Sept. 9, 1927, the Indiana Commission refused to entertain a petition for the abolition of free toll service and the establishment of a toll rate where it appeared that the petitioning company has already inaugurated a toll system without the knowledge and consent of the Commission. Commissioner McIntosh said: "It appears from the evidence and circumstances surrounding this case that the order of the Commission approved April 23, 1926, has been ignored and disobeyed by the A. & M. Telephone Company. The Commission does not believe that the cure for such a situation lies in the granting of permission to do things that have already been done without its knowledge or consent.

The petition now pending for permission to exact certain fees from subscribers which have already been exacted, seems unfair and irregular and does not appear just to any parties concerned. Moreover, the petition now pending to discontinue free service and to sub-

stitute toll charges therefor, is in substance an appeal for increase in rates. No exhibit or evidence presented at this hearing was sufficiently detailed and complete to justify the Commission in passing upon matters affecting rate increases. It is the opinion of the Commission that the reasonable thing to do is to deny the request of the petitioner and require a compliance with the order of April 23, 1926, and it will be so ordered."

In Re New Lebanon Teleph. Co. No. 9012, Sept. 2, 1927, the Indiana Commission, in approving an increase of rates for a small telephone exchange for purposes of allowing an improvement of service, ordered that business and residence subscribers should pay monthly for service and be allowed a collection fee of 25 cents per month if bills were not paid before a monthly date.

In Re Home Teleph. Co. M-1672, Sept. 9, 1927, free interexchange was ordered discontinued and a toll rate established between two neighboring villages. The Minnesota Commission said that the practice of allowing free service was discriminatory in view of the light traffic over the line at the corresponding expense of its maintenance and also § 7, Chapter 152, General Laws of 1915, which provided that no telephone company should charge, demand, or collect in any manner whatsoever a greater or less compensation for any intrastate service from any customer than it charged, demanded, or collected from any other customer for like service.

An increase of rates was allowed in Re Bucklin Teleph. Exch. (Mo.) Case No. 5100, Aug. 20, 1927, with the understanding that operating conditions formerly under complaint, would be improved, the petitioner having shown that the unsatisfactory service was due to the inadequacy of revenue.

In Re Union Teleph. Co. Application No. 6659, March 21, 1927, the Nebraska Commission approved an increase of 25 cents per name per month, for extra directory listing, and an increase of 50 cents per month where the subscriber is out of the city and desires the telephone to remain in place on dead line connection. The Commission said that these rates conformed to the usual practice and special hearing as to the company's return was unnecessary.

In Re Southern Bell Teleph. & Teleg. Co. (N. C.) Aug. 24, 1927, a seasonal exchange service rate was allowed.

In Re North-West Teleph. Co. U-3589, Sept. 8, 1927, the Wisconsin Commission, commenting upon the cost of interexchange service between two communities necessitating separate exchanges, made the following statement: "In judging of the reasonableness of this schedule it must be borne in mind that the service to which subscribers are entitled is furnished through two exchanges at a cost of about $4 per station per year, as stated previously, above what the direct operating expense would be if it were practicable to furnish

it through a single exchange. The location of the communities, however, and their relationships are such that a consolidation of the exchanges does not appear practicable, and, in fact, might not be economical because of the necessity of a greatly increased investment in cable and wire plant."

d. Water.

In Re La Crosse, U-3626, Oct. 10, 1927, The Wisconsin Commission approved an increase of water rates to rural patrons to cause a differential with rates charged city patrons. The Commission pointed out that the rural consumers had been receiving general service plus fire protection without contributing anything toward the expense of the city by way of taxes. Authority on such differential was reviewed.

NEW JERSEY BOARD OF PUBLIC UTILITY COMMISSIONERS.

RE MOUNTAIN WATER SERVICE COMPANY.

Discrimination — Contract rates — Water utility.

1. Preferential rates under contracts which may not have been discriminatory when created but have become so under changing conditions must give way whenever a rate regulatory body prescribes just and reasonable general rates, p. 289.

Rates — Reasonableness — Value of service — Water.

2. The Commission will not approve an increase of rates which, although deserving, appears likely to result in loss of essential patronage, but it will endeavor to adjust the increase to such proportions as will be likely to evade this hazard, p. 290.

Rates — Contract rate in consideration for privileges to utility.

Discussion of purchase or stated rental of privileges by utility from a large customer rather than reduced rate contracts in consideration therefor, p. 289.

[September 15, 1927.]

APPLICATION for increase of water rates; increase modified.

Appearances: John J. Treacy for the petitioner; J. W. De Yoe for the boroughs of Butler, Pompton Lakes and Bloomingdale; H. V. Osborne and A. H. Cornish, of Osborne, Cornish & Scheck, for American Hard Rubber Company and Pequannock Rubber Company.

By the Board: On August 1, 1927 the Board issued its de-

cision in the matter of the application of the petitioner for increased rates, in which the charges for public and private fire protection and the service charges for metered service as filed by the company were approved, but the schedules of flat or fixture rates and of consumption charges for metered service were disallowed and different schedules prescribed.

Under the same date an order was entered requiring the company to install mains in several streets in the boroughs of Butler and Bloomingdale to improve the fire service in said localities.

Upon application of the company for a rehearing to be confined to the question of undue and unjust discrimination in rates alleged to be caused by said decision, another order was issued under date of August 11, 1927, suspending the effective date of the application of the rates provided for in the order of August 1, 1927. At the rehearing, the company submitted exhibits and testimony purporting to show that the schedules of flat or fixture rates prescribed by the Board on August 1, 1927 were proportionately too low and, per contra, the consumption charges for metered service were too high, and that this allocation of revenues would result in undue discrimination to the disadvantage of wholesale consumers. It was admitted by the company that the data as to its yearly business submitted at the prior hearings was insufficient and incomplete; furthermore, the total water consumed by the wholesale customers varies considerably from year to year. The matters before the Board presented by the company's application are the readjustment of the flat or fixture rates and the charges for water used through meters.

The rates for these items prescribed by the Board, and the changes now proposed by the company, are as follows:

	As set by the Board 8/1/27.	Petitioner's Revision.
Flat or Fixture Rates.		
Premises without outside connection	$15.00	$18.00
Premises with outside connection	21.00	24.00
Consumption Charges for Metered Service.		
For the first 40 M cu. ft. per year	$2.25 per M cu. ft.	
For the next 360 M cu. ft. per year	1.87 per M cu. ft.	
For the next 3,600 M cu. ft. per year	1.33 per M cu. ft.	
Over 4,000 M cu. ft. per year	.75 per M cu. ft.	
For the first 40 M cu. ft. per year	$2.90 per M. cu. ft.	
For the next 80 M cu. ft. per year	1.80 per M. cu. ft.	
Over 120 M cu. ft. per year	.75 per M. cu. ft.	
Minimum bill for metered service	$15.00	$18.00

In determining the revenue collectible after the changes now proposed, several corrections become necessary as a result of the submission of more complete data as to the business being done by the company. The anticipated revenue under the schedules now proposed would be somewhat increased if all customers continued to use water at the same rates of consumption. Increases to the extent proposed may not result in the corresponding increase in gross revenues.

Counsel for the municipalities raised the question that the company's plant and property were overdeveloped for the present needs of the consumers and that a further deduction in value should be made of property reasonably used and useful in the service of the public. The American Hard Rubber Company and Pequannock Rubber Company objected to any increase in rates over and above their present rates which were fixed by contract.

The Board in its decision eliminated certain land and land values as property not reasonably used and useful in the service to the consumers. The testimony offered on the rehearing does not indicate the necessity of any further deduction, nor does it appear that the plant and property are overbuilt beyond the needs of present customers or those who may be added in the reasonably near future.

[1] It was pointed out by counsel for the rubber companies that one of their clients, the American Hard Rubber Company, was entitled to a preferential rate in exchange for the use of its water rights by the water company, under a contract dated December 31, 1915 (Exhibit P–1–R.H.). Applying the rates specified in this contract, the rubber company would have paid for its 1916 water requirements $305.29 less than it would have been required to pay if the then existing regular rates were to be applied in full. Preferential rates under contracts of this kind may not be unjustly discriminatory at the time the contract is entered into, but may become so under changing conditions. For this reason it seems to be the better policy to pay either a purchase price or a stated rental for the privileges desired by the utility and exact the full regular rate for service to the vendor or lessee if the latter is then or thereafter becomes a customer of

the utility. This is in accordance with the decisions of the supreme court of this state (Edison Storage Battery Co. v. Public Utility Comrs. 93 N. J. L. 301, P.U.R.1920B, 234, 108 Atl. 247) that contracts under which preferential or discriminatory rates are charged must give way whenever a rate regulatory body prescribes just and reasonable and nondiscriminatory rates for customers generally.

[2] In accordance with the schedule filed by the water company in its original petition, it was proposed to charge the borough of Pompton Lakes at the uniform rate of $100 per million gallons and not in accordance with the block rate schedule under which other wholesale customers would receive service. The rate charged previously to the borough of Pompton Lakes had been $60 per million gallons. Under the schedule provided for in the Board's order of August 1, 1927, the net resultant rate would have been approximately $153 per million gallons. It has developed that the borough of Pompton Lakes might be able to obtain a supply of water from another source and if the Mountain Water Service Company is to lose the borough of Pompton Lakes as a customer, the relation between revenues and expenses would be such that it would possibly call for a further readjustment in rates. It will, therefore, not benefit the water company if the rate prescribed for service to wholesale customers is on such a basis as to become prohibitive and result in the loss of such customers. The resultant rate to the borough of Pompton Lakes should, therefore, closely approximate the rate originally proposed, namely $100, and this will be accomplished by the meter rate schedule approved hereafter. As this will result in some reduction in the revenues to the company, this adjustment will be accompanied by a revision of the flat or fixture rates and an increase in the minimum charge for metered service.

The Board, therefore, finds and determines that the following schedule is just and reasonable and should be allowed to go into effect:

Flat or Fixture Rates.

Premises without outside connection	18.00 per year
Premises with outside connection	24.00 per year

Consumption Charges for Metered Service.

For the first 40 M cu. ft. per year	$2.75 per M cu. ft.
For the next 80 M cu. ft. per year	2.00 per M cu. ft.
For consumption in excess of 120 cu. ft. per year	.70 per M per year

P.U.R.1928A.

The readiness to serve charge shall be as determined in the Board's order of August 1, 1927.

The bills for metered service shall be subject to a minimum charge of $18 per year.

If the complete approved schedules, as modified herein, are filed with this Board on or before September 20th, they may be made effective with bills rendered for service beginning July 1, 1927.

This finding is further conditional upon the company's acceptance of and compliance with the order of August 1, 1927, requiring said company to expend the sum of $45,000 to reinforce its fire mains in its Butler district, and the Board will retain jurisdiction in this matter until affirmative proof shall have been submitted by said applicant that the terms of said order have been complied with by it; said acceptance is to be made in writing prior to rendering any bills based on the schedules approved August 1, 1927 or as amended herein, and in any event not later than September 30, 1927.

VIRGINIA STATE CORPORATION COMMISSION.

COMMONWEALTH OF VIRGINIA EX REL. CITY OF RICHMOND

v.

RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY.

[Case No. 3138.]

Crossings — Statutory construction — Contracts of county void for lack of power.

1. Where a statute (subsec. 39, § 1294d Pollard's Code 1904) provides that "existing" highway crossings on, above or below grade, shall be positively maintained by railroads whose lines they cross, a contract for consideration between a county and a railroad, whereby the county purports to assume in whole or in part such obligations of maintenance, is void for lack of delegated power to the county to exercise the police power of the state in that particular; and such stipulations of attempted release are null and void regardless of considerations of public policy, p. 300.

P.U.R.1928A.

Statutes — Statutory construction — Crossings.

2. Where a statute (subsec. 39, § 1294d Pollard's Code 1904) providing for maintenance by railroads of "existing" highway viaducts has been omitted in a subsequent revision of the state code (1919) purporting to cover such passages (Michie's Code 1924, § 3974a) either by purpose or mistake the prior provisions are by construction annulled and the common law again in force if the new legislation does not specifically cover the situation, and upon that construction the expense must be borne by the city or county, p. 319.

Commissions — Jurisdiction to take judicial notice.

3. Department of the State Corporation Commission will not of its own motion take judicial notice of an ordinance by a city, and when upon petition of a city to force a railroad to maintain a highway viaduct over its track, it appears (Michie's Code—1924—revision of 1919) that the state had delegated to the city police power to pass an ordinance covering such highways, and no such ordinance is placed in evidence, the petition will be dismissed without prejudice to the city's right to ascertain the existence of such ordinance, p. 321.

[July 27, 1927.]

PETITION of the city of Richmond praying that the Richmond, Fredericksburg & Potomac Railroad Company be required to repair overhead bridge; petition dismissed without prejudice.

Epes, Commissioner: The city of Richmond, by J. Fulmer Bright, its mayor, petitioned the State Corporation Commission to require the Richmond, Fredericksburg & Potomac Railroad Company to repair that portion of the overhead bridge, known as the "Boulevard Bridge" which carries the street in the city of Richmond known as "The Boulevard" over the tracks of the Richmond, Fredericksburg & Potomac Railroad Company. This bridge spans the tracks of both the Seaboard Air Line Railway Company and of the Richmond, Fredericksburg & Potomac Railroad Company; but the portion of the bridge over the tracks of the Seaboard is not here involved, repairs thereto having been made.

At the time this bridge was constructed in 1912 the territory in which it lies was in Henrico county; but effective July 17, 1914 was annexed to the city of Richmond.

The portion of this bridge spanning the tracks of the Richmond, Fredericksburg & Potomac Railroad Company is now badly in need of repairs due to a partial disintegration of the

concrete encasing the steel girders caused by gases and smoke from the company's locomotives.

The railroad company has refused to make the repairs needed on the grounds that under certain contracts between it and the board of supervisors, it became the duty of Henrico county, and not of the railroad company, to keep this bridge in repair; which duty, as a matter of law, devolved upon the city of Richmond when it annexed the territory in which this bridge lies.

The city does not contest the point that the duties of the county of Henrico as to the annexed territory has devolved upon it; but insists that had there been no annexation, it would be the duty of the railroad company, and not of the county of Henrico, to keep this bridge in repair; and hence it is not now the duty of the city to keep it in repair.

The facts of the case are not disputed and are as follows:

In 1889 the county of Henrico laid out and opened a public road known as the "Boulevard Extension" from Broad street road to the Hermitage road, crossing the right-of-way of the Richmond, Fredericksburg & Potomac Railroad Company at which is now the state fair grounds, at the location of the bridge now in question, at which point there was then no existing road crossing of any kind.

The road was carried over the tracks of the railroad company on a wooden overhead bridge about twenty feet wide, built in pursuance of an agreement between the board of supervisors of the county, and the railroad company.

The minutes of the board authorizing this agreement read as follows:

"Mr. H. D. Goddin, supervisor of the district of Brookland, this day laid before the board a communication from Mr. Joseph Bryan, the Commissioner appointed by the court, to construct a road known as the "Boulevard Extension" from the Broad street road to the Hermitage road, accompanied by three letters of the general superintendent of the Richmond, Fredericksburg & Potomac Railroad Company with reference to the crossing of said road over said railroad. And it appearing from the said letters that the said railroad company proposes as follows: To construct at its cost, not exceeding Five Hundred Dollars, an over-

head bridge for the crossing of said road over the said railroad and to construct the approaches to said bridge, which are to be 16 feet at the top of the fill and at a grade not exceeding 6 per cent and with slopes of one to one and one-half per cent, and for making said approaches the county shall pay said company the sum of $400 in four annual payments of $100 each, with interest, the first payment to become due in one year from the time said approaches are constructed; that upon the completion of said work it shall be turned over for supervision and maintenance to the county, and that whenever the structure shall be so much out of repair as to involve the danger of its falling, whether loaded or unloaded, the county will upon the request of the railroad company, make the necessary renewals, and further provided that the county protect the railroad company from claim for damages on account of said construction.

Resolved, that said proposition be accepted with the following changes and modifications: That said railroad company shall keep the said bridge and abutments in proper repair and that the county of Henrico shall be responsible to said railroad company for the cost of said repairs, and that in consequence thereof that the county shall be released from all loss or damage resulting from the failure of the company to keep said bridge and abutments in repair. And it is ordered that when a contract has been prepared to this effect, the chairman of the board is authorized to sign the same, and the same shall be attested by the clerk and the seal of the board affixed. Said contract shall be signed in duplicate and a copy retained by the Board."

The contract entered into between the board and the railroad reads as follows:

"This agreement, made and entered into this 14th day of May, 1889, between the Board of Supervisors of Henrico County, Virginia, party of the first part, and the Richmond, Fredericksburg & Potomac Railroad Company, party of the second part.

Whereas, the county of Henrico has authorized the construction of a direct extension of the so-called Boulevard road, from Broad street to the Hermitage road, across the railroad of the party of the second part; and

Whereas, it is the desire of both parties hereto that such crossing should be elevated above the railroad grade, so as to enable vehicles to pass without danger of collision with trains, and and trains to pass under said crossing at a sufficient depth to avoid danger to persons upon such trains.

Now, therefore, this agreement *witnesseth,* that for and in consideration of the sum of $400 to be paid by the party of the first part to the party of the second part in four successive annual installments of $100 each, with interest from July 1, 1889, the first installment to be due and payable July 1, 1890, and of certain things to be done by the party of the second part as hereinafter set forth, it is agreed that the party of the second part will, at its own cost and charge, and within a reasonable time, construct a substantial wooden bridge above its road at the crossing aforesaid, not less than 20 feet wide in the clear, with proper close sides and with earthen embankments or ramps with side rails approaching it on each side, of similar width and natural slope and with a grade not exceeding 6 rise in 100 horizontal. Said bridge and approaches to be well constructed and when completed to be delivered to the county as its property. Said party of the second part undertakes to inspect and repair and renew said bridge and approaches whenever in the judgment of said party it may be necessary to render the same safe and serviceable; but the cost incurred in such repair and renewal is to be repaid to the second party by the party of the first part. And it is agreed that so long as said party of the second part shall make such repairs and renewals said supervisors shall make prompt payment therefor out of any moneys they may have applicable for the purpose; that is to say, within ninety days from presentation by the party of the second part of their bills for the same; and the said party of the second part shall save and hold harmless the said county from any damage which may directly result, either from the defective construction or condition of said bridge, or approaches thereto, or from the failure to maintain it in proper repair, but if said party of the first part be unable to pay for said repairs within ninety days as aforesaid, and shall fail or refuse to provide for the payment of such repairs out of the next annual levy for county purposes,

then the said party of the second part shall be then and thereafter released from any obligation to maintain or repair said work, or from any responsibility therefor, and the party of the first part shall then, as owner of said property, become wholly and solely responsible therefore."

These minutes and this contract contain all the evidence that was introduced as to acquisition by the county of a right to cross the right-of-way of the railroad company at this point.

After the erection of this wooden bridge the railroad company made repairs thereon as needed, and the county reimbursed the company therefore.

In 1895 the railroad company removed this wooden bridge, and replaced it with a steel bridge of approximately the same dimensions, at a cost of $1,175, no part of which was paid by the county of Henrico. There is no evidence of any agreement having been entered into between the county and the company as to the removal of the wooden bridge or the erection of the steel bridge.

The railroad company made repairs to this steel bridge as needed, for which it billed the county of Henrico. The county paid these bills, but frequently after much delay. The last payment testified to was an item of $478.61 paid in February, 1912, for repairs made in November, 1906.

In 1912 the State Fair Association, Inc., desired to have the said 20 feet steel bridge replaced by a new and wider bridge; and the State Fair Association, Inc., the board of supervisors of Henrico county, and the Richmond, Fredericksburg & Potomac Railroad Company entered into the following contract:

"This agreement, made and entered into this 3rd day of September, 1912, between the board of supervisors of Henrico County, Virginia, party of the first part, the Richmond, Fredericksburg & Potomac Railroad Company, party of the second part, and the Virginia State Fair Association, Inc., party of the third part.

Whereas, under contract entered into and between the said board of supervisors and the Richmond, Fredericksburg & Potomac Railroad Company, under date of the 14th of May, 1889, a bridge, therein described and provided for, was con-

structed on the Boulevard road across the railroad of the party of the second part, and

Whereas, the said bridge has been in use for a score or more of years, and

Whereas, by the terms of said contract it was provided, among other things, that the said railroad company should maintain and repair the said bridge at the expense of the county under and in accordance with the terms of the said contract, and

Whereas, the party of the third part now contemplates the erection of a new bridge as a substitute for the old one, in accordance with certain plans and specifications which have been, or are to be, submitted to the board of supervisors of Henrico county and the Richmond, Fredericksburg & Potomac Railroad Company, and

Whereas, the said board of supervisors and the said railroad company are willing that the said new bridge should be erected as a substitute for the old one,

Now, therefore, in consideration of the premises, and other valuable consideration, the said board of supervisors and the said railroad company agree that the said new bridge may be erected in accordance with the plans and specifications, subject however, to the work of construction being done under the supervision of, and in accordance with the direction of, the engineers of the railroad company and such agent as the county authorities may from time to time designate and appoint.

In consideration of all of which the said board of supervisors of Henrico county does hereby agree with said railroad company to a full recision of said contract of the 14th day of May, 1889, and does release said railroad company from any and all obligations growing out of said contract, and, also, from any obligations to make repairs to, or otherwise to be responsible for the erection of said new bridge, or its maintenance when erected.

This contract, however, is subject to the further condition that the consent of the said railroad company to the construction of the new bridge has reference to such part of the said bridge as will span its own right of way, and not at all to that part of such new bridge as may cross the property of the Seaboard Air Line Railway.

This contract is also subject to the further condition and understanding that the said State Fair Association will save the said railroad company from any loss, injury, or damage which it may sustain by reason of the construction of the said new bridge.

It is further agreed by and between the said Virginia State Fair Association, Inc., and the board of supervisors of Henrico county, Virginia, that the said association will save the county, or its officials, harmless from any loss or damage which it, or they, may sustain by reason of the construction of the said new bridge; and that the said new bridge to be constructed shall be built under the supervision of Mr. P. St. Julian Wilson, highway commissioner of the state of Virginia, and when completed shall be inspected and approved by him before acceptance, and shall become one of the bridges and highways of the county of Henrico.

In testimony whereof, the board of supervisors of Henrico county has caused its name to be signed by its chairman and its seal affixed by its secretary; the Richmond, Fredericksburg & Potomac Railroad Company has caused its name to be signed by its president and its seal annexed and attested by its secretary, and the Virginia State Fair Association, Inc., has caused its name to be signed by the chairman of the executive committee and its seal affixed and attested by its secretary."

In pursuance of this contract the old 20-foot steel bridge, erected in 1895, was removed and replaced with an entirely new structure, except for two of the stone piers under the south end of the bridge. This new structure, the present bridge, is a through girder steel bridge, with steel floor beams in case in concrete on the under side. The total width of this bridge is 58 feet 2 inches, and the piers and abutments of it occupy a much larger area of the property of the railroad company than did the piers and abutments of either of the former bridges.

The railroad company has made no repairs to this bridge since it was built in 1912. There is no evidence of any work having been done on this bridge by the county of Henrico or the city of Richmond, other than that in 1926 the city painted the exposed iron work of the bridge, and put a new asphalt top on

the old macadam on the approaches thereto and on the roadways on the bridge itself.

So far as the record discloses the council of the city of Richmond has enacted no ordinance, nor passed any resolution, relating to the duty of the Richmond, Fredericksburg & Potomac Railroad Company to maintain the bridge in question, or to the duty of railroads generally to maintain crossings by city streets projected across existing railroads.

(1) If the public duty to repair the bridge in question rests upon the railroad company, the State Corporation Commission upon the complaint of the mayor or council of the city of Richmond, has the power and authority to require the railroad company to make the necessary repairs. (See Virginia Constitution, § 156b; §§ 3716, 3717, 3718, 3719, 3720, 3721, and 4001, Code 1919.)

(2) The authority of the state to impose upon railroad companies the duty to maintain crossings of railroads and highways rest upon the police power of the state.

The railroad company acquires its rights subject to the police power; and the state may compel them to construct, improve, and maintain crossings at their own expense at those highways which are afterwards opened and laid out across their rights of way or pay a part of the expense thereof to the same extent as in the case of streets and highways in existence when the railroad was constructed. (See Richmond, F. & P. R. Co. v. Richmond, 145 Va. 225, 133 S. E. 800; 3 Elliott on Railroads, 3d Ed. § 1570, at p. 378; State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 380, 108 N. W. 261, affirmed St. Paul, M. & M. R. Co. v. Minneapolis, 214 U. S. 497, 53 L. ed. 1060, 29 Sup. Ct. Rep. 698; Chicago, M. & St. P. R. Co. v. Minneapolis, 232 U. S. 430, 58 L. ed. 671, 34 Sup. Ct. Rep. 400; Northern P. R. Co. v. Minnesota ex rel. Duluth, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341, 22 Ruling Case Law, Railroads §§ 41 and 136; 33 Cyc. Railroads, p. 286).

The public duty to maintain such crossings may be imposed by (a) The common law; (b) by a statute passed by the legislature, or (c) by the legislative act of a county, city, or town where the state has delegated to a county, city, or town the power

to exercise the police power of the state in this particular, by either an express delegation of the power, or by a general delegation to it of the power to regulate and control its roads and streets, without restriction in this particular.

So far as the record in this case discloses there is no ordinance or resolution of the city council of the city of Richmond in any way affecting the duty of the Richmond, Fredericksburg & Potomac Railroad Company to maintain the crossing at the Boulevard bridge; and the case at bar is to be decided upon a consideration of the common law and statutes of Virginia, and any valid action of the board of supervisors of Henrico county with reference to the maintenance of this bridge.

[1] (3) We find no case in Virginia which declares clearly the common law rule as to upon whom rests the duty to construct and maintain the crossing of a new highway opened across an existing railroad; but from a review of the authorities we are of the opinion that at Common law in Virginia, where a county, city, or town opened a new highway across a previously constructed railroad, the duty to maintain and construct the crossing (whether at grade, or above or below grade) rested upon the county, city, or town.

The case of Hicks v. Chesapeake & O. R. Co. 102 Va. 197, 45 S. E. 888, appears to have been decided upon the theory that the rule at common law in Virginia was that the county, city, or town opening the highway was responsible for the construction and maintenance of such crossings.

In the Hicks case, *supra,* the railroad, the successor in title to the James river and Kanawha Canal Company, in 1886 dedicated to the town of Scottsville a highway across the right of way of the James river and Kanawha Canal, the town opened the highway, and constructed a bridge across the canal; and by deed, executed in pursuance of an ordinance of the town council released the railroad company from all obligations to maintain the bridge and expressly took upon itself the duty to maintain the bridge.

The court in an action by Hicks to recover damages for an injury alleged to have been caused by the negligent failure of the railroad company to repair the bridge, finds as a fact that the

town "for a valuable consideration" did release the railroad company from "all obligation to maintain the bridge in question and take upon itself all duty, obligation, and liability with respect thereto."

In holding that it was the duty of the town, and not of the railroad to repair this bridge the court, at p. 200, says:

"The town of Scottsville had the lawful right to terminate the divided authority over the street in question, existing between itself and the railroad, and in making the contract under consideration by which it assumed the exclusive and undisputed control over its highway, *it was only taking upon itself the duty and responsibility imposed upon it by the common law and by statute.* The contract in question constitutes a dedication of the bridge by the railroad to the town for public use, and a complete and formal acceptance thereof by the town, and the defendant in error is thereby released from all responsibility to the public in the premises." (Italics ours)

While the case of Chesapeake & O. R. Co. v. Jennings, 98 Va. 70, 34 S. E. 986, involved the question of the duty of the railroad company to keep in repair a bridge across an existing highway which was made necessary by the mode adopted by the canal company (predecessor in title of the railroad company) in constructing its works, and built by the railroad company; the reasoning of the court in holding it to be the duty of the company to keep in repair the bridge in question, supports the theory that at common law it is the duty of the county, city, or town opening a new highway across a railroad to construct and maintain the crossings. As the basis of its holdings the court quotes as follows from Elliott on Roads and Streets:

"A bridge may be free and open to the public, yet the person by whom it was constructed be charged with maintaining it in safe and convenient condition for travel. This is so where the facts show that the bridge was erected for private benefit, and not for public use. In such a case there is no presumption that the public has accepted the bridge and relieved the person by whom it was built from responsibility. Thus where a private corporation digs a raceway or a canal across a highway and builds a bridge over it, there is no presumption of acceptance by

the public, and the builder is charged with the duty of keeping it in safe condition. In such case the benefit is to the builder; for the public, but for his act, could have traveled on the solid road. Where, however, the bridge is of public utility, and is not made necessary by the act of the person who built it, acceptance by the public will be presumed, and the builder will not be responsible for keeping it in safe and fit condition."

The earliest statute in Virginia dealing with the duty of a railroad company to make improvements in an "existing" crossing is chap. 422, Acts 1883–84:

"Chap. 422—An act to provide, in the future construction of railways for secure crossings on county, roads, streets, and other public highways.

1. Be it enacted by the general assembly of Virginia, that hereafter all railways constructed across county roads, streets, or other highways, or county roads, streets, and public highways constructed across existing railways, shall, where practicable, pass at surface grade, or pass beneath or above the existing structure, at a sufficient depression or elevation, as the case may be, with easy gradings, so as to admit of speedy and safe travel over either.

2. At all such existing crossings on the rail and road-bed of a railway, the last, or junior constructed improvement shall, within twelve months from the passage of this act, where practicable, be so improved, as to the grading on the full width of the railway land, at the crossing, as to make it level and smooth for rapid transit; and where such improvement is to be made in a county road the same shall be made by the proper county authorities charged with the working and improvement of county roads, and where such improvement is to be made in any such railroad it shall be made by the company or corporation operating the same.

3. This act shall be in force from its passage.

In § 2, this act in dealing with all "existing" crossings requires that the crossings shall be improved to meet the requirements of the statute, but in providing for such improvement is apparently undertaking to place the duty where it rested at common law.

In Richmond, F. & P. R. Co. v. Richmond, 145 Va. 225, 133 S. E. 800, the court construes in a similar statute the language "to be made in the county road" to mean for the benefit of the county road.

The common law on this subject is stated in 33 Cyc. at p. 285, as follows:

"In the absence of statute a railroad company cannot be required to construct and maintain crossings where a street or highway is made across its right of way after the construction of the railroad, there being no common law duty on the part of the railroad company in such cases to construct crossings or bridges or approaches thereto; but such duty being upon the public authorities by whom the street is established and constructed." Citing: Albia v. Chicago, B. & Q. R. Co. 102 Iowa 624, 71 N. W. 541; O'Fallon v. Ohio & M. R. Co. 45 Ill. App. 572; Northern C. R. Co. v. Baltimore, 46 Md. 425; State v. Wilmington & Weldon R. Co. 74 N. C. 143; Boston & A. R. Co. v. Cambridge, 159 Mass. 283, 34 N. E. 382; Chester v. Philadelphia, W. & B. R. Co. 3 Walker (Pa.) 368.

In Cleveland v. City Council of Augusta, 102 Ga. 233, 29 S. E. 584, 43 L.R.A. 638, the court used the following language which is embodied in the text of 22 Ruling Case Law at p. 890, as stating the common law on this subject:

"At common law the rule is that when a highway is made across another one already in use, the crossing must not only be made with as little injury as possible to the old way, but whatever structures may be necessary to the convenience and safety of the crossing must be erected and maintained by the person or corporation constructing and using the new way. Chesapeake, O. & S. W. R. Co. v. Dyer County, 87 Tenn. 712, 11 S. W. 943; Northern C. R. Co. v. Baltimore, 46 Md. 425; People ex rel. Bloomington v. Chicago & A. R. Co. 67 Ill. 118; Eyler v. Alleghany County Comrs. 49 Md. 257, 269; Dygert v. Schenck, 23 Wend. (N. Y.) 446; 1 Thompson on Neg. 328, 343; Louisville & N. R. Co. v. State, 3 Head (Tenn.) 523."

In the very well considered case of State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 380, 108 N. W. 261 (decided in 1906) the supreme court of Minnesota, upon excellent

reasoning has held that under the common law of the state of Minnesota it is the duty of the railroad to construct and maintain crossings at highways whether the highway existed at the time of the construction of the railroad, or was thereafter constructed. The court says in its opinion:

"A railroad company receives its charter and franchise subject to the implied right of the state to establish and open such streets and highways over and across its right of way as public convenience and necessity may from time to time require. That right on the part of the state attaches by implication of law to the franchise of the railroad company, and imposes upon it an obligation to construct and maintain at its own expense suitable crossings at new streets and highways to the same extent as required by the rules of the common law at streets and highways in existence when the railroad was constructed."

This is a declaration of the common law well founded upon reason and based upon a broader public policy more in accord with the present statutory policy of Virginia, than that sustained by the weight of authority and apparently recognized by the courts and legislature of Virginia; but it is not the common law as it existed in Virginia.

(4) There had been for a number of years prior to 1884 a statute permitting railroads to alter a county road for certain purposes "whenever it shall have made an equally convenient road in lieu thereof" (Code 1873, p. 541); but the history of the Virginia statutes relating to the respective duties of railroads and counties, cities and towns as to, (1) the construction, improvement, and maintenance of crossings "hereafter constructed" by railroads across existing highways, or of existing railroads by new highways, and (2) as to the improvement and maintenance of "existing" crossings begins with chap. 422, Acts 1883–84, which is quoted in full above.

With certain modifications §§ 1 and 2 of the Acts of 1883–84 were carried into the Code of 1887 as §§ 1095 and 1096 (below quoted at length), which were in effect when the contract of 1889 was entered into between the railroad company and the board of supervisors of Henrico county, the crossing of the Boulevard first made, and the first bridge constructed. But § 2 of the Act

of 1883–84 applied to "All such existing crossings on the rail and roadbed of a railway;" while § 1096 (Code 1887) has been broadened to apply to "every existing crossing such as is mentioned in the preceding section," and the preceding section (1095) mentions and applies to crossings at surface grade or above or below the grade of the railroad.

Neither the Act of 1883–84 nor §§ 1095 and 1096 made any change in the common law of Virginia as to the respective duties of construction, improvement, and maintenance of crossings of railroads and highways.

When the legislature of 1902–3–4 came to revise and rewrite the statute law relating to railroads and other public service corporations, after the Constitution of 1902 became effective, it passed the act entitled "An Act concerning Public Service Corporations" approved January 18, 1904. This act did not in express terms repeal §§ 1095 and 1096 of the Code of 1887, but in effect, for § 1095 substituted Subsec. 38 of chap. 4 of the Act of 1904, (Subsection 38, § 1294d, Pollard's Code 1904), dealing with all crossings "hereafter constructed," and for § 1096 substituted Subsec. 39, of chap. 4 of the Act of 1904, (Subsec. 39, § 1294d, Pollard's Code, 1904) dealing with "existing" crossings. At the time the contract of September 3, 1912, was entered into the present bridge built, Subsection 38 and 39, § 1294d, Pollard's Code 1904, were in effect.

We quote below § 1095 and Subsection 39 in parallel columns and § 1096 and Subsection 39 in parallel columns. The whole of all four statutes are quoted verbatim with the order of the words unchanged; but so spaced that where in Subsection 38 the same or similar words are used as are used in § 1095 they fall in corresponding lines and corresponding positions in the line. The same arrangement is adopted in the comparison of § 1096 and Subsection 39. All words in Subsection 39 which are not copied verbatim from § 1096 are italicised.

"Sec. 1095. *Railroads, County Roads, and Streets to Cross Each Other at Easy Grades.*	"(38) It is hereby declared to be the policy of this state
"Every railroad hereafter	by another, or of a county road

constructed across a county road, street or other highway, and every county road, street or other highway hereafter constructed across a railroad, shall, as far as is practicable pass at surface grade or pass beneath or above any existing structure at a sufficient depression or elevation, as the case may be, with easy grades so as to admit of safe and speedy travel over each."

"Sec. 1096. *Crossings, How and by Whom Made.*

At every existing crossing such as is mentioned in the preceding section the grade of the work last constructed, to the full width of the railroad land, shall be made sufficiently smooth and level to admit of safe and speedy travel over such crossing. Where such improvement is to be made in a railroad, it shall be made by the corporation, company, or person operating the same. Where it is to be made in a county road, street, or other highway, it shall be made by the authorities having the control of such county road, street or other highway and charged with the duty of keeping the same in order."

or highway by a railroad, or of a railroad by a county road or highway, shall, wherever reasonably practicable, pass above or below the existing structure. And every railroad hereafter constructed across another railroad or across a county road or highway and every county road, or highway hereafter constructed across a railroad, shall, wherever it is reasonably practicable, and does not involve an unreasonable expense, all the circumstances of the case considered, pass above or beneath the existing structure at a sufficient elevation or depression, as the case may be, with easy grades so as to admit of safe and speedy travel over each. The provisions of this section shall not apply to crossings in cities or towns, nor to electric railways within or without cities and towns."

"(39) At every existing crossing such as is mentioned in the preceding section, the grade of the work last constructed, to the full width of the *road* crossing, shall be made sufficiently smooth and level to admit of safe and speedy travel over such crossing. *When* such improvement is to be made in a railroad it shall be made by the corporation, company, or person operating

the same. *When* it is to be made in a county road, street, or other highway, it shall be made by *the corporation whose track is to be crossed, and the expense shall be borne equally by said corporation and by county, city, or town having control of such county road, street, or other highway. When the crossing is at an elevation the approaches and structures shall be safe, permanent, and substantial, and when the crossing is underneath the road to be crossed, the road, street, or highway and all necessary drains and ditches shall be put in good, permanent condition, and the structure supporting the road shall be safe, substantial, and permanent. Whenever the character of the work to be done on the structures, roads, streets, or highways, drains and ditches cannot be agreed to by the corporation and the county, city, or town, bearing the expense of the crossing, the same shall be fixed and determined by the State Corporation Commission. After said crossing has been constructed the corporation whose track or work is crossed shall maintain the same.*"

As pointed out by Judge Burks in the opinion in Richmond, F. & P. R. Co. v. Richmond, 145 Va. 225, 133 S. E. 800, the

Act of January 18, 1904 by Subsections 38 and 39 (Subsections 38 and 39, § 1294d, Pollard's Code) made some very material changes in the public policy and law of Virginia as to the duties of the railroad companies to construct, improve, and maintain crossings of railroads and highways.

Among other changes, as to all "existing" crossings, at grade, or above or below grade, it restricted cities and towns in the exercise of the police power of the state delegated to them in their charters and the general statutes in so far as there was in Subsection 39 a direct exercise of the police power with reference thereto, that is with reference to the duty of railroads to construct or improve and to wholly maintain such crossings, and of the city, or town, in certain cases to pay one half the expense of such construction or improvement.

The language of Subsection 39 is not, perhaps, as clear and explicit as is desirable in legislative enactments; but the preceding section (Subsection 38) clearly mentions "all crossings" and the first sentence of Subsection 39 is by its terms made applicable to "every existing" crossing, such as is mentioned in the preceding section and when considered in the light of the history of Subsections 38 and 39 as traced above, we think it plain that Subsection 39 applied to all crossings existing at the time the act of January 18, 1904, became effective, whether the crossing was at grade or above or below grade. The effect of the contracts between the Richmond, Fredericksburg & Potomac Railroad Company, and the county of Henrico, we will consider later, but in the absence of such contracts at the time the contract of September 3, 1912, was entered into and the present bridge constructed the respective duties as to the improvement and maintenance of the Boulevard Crossing (bridge) were as set out in said Subsection 39; and the Richmond, Fredericksburg & Potomac Railroad Company was expressly charged by this act of the Legislature with the public duty to wholly maintain this crossing.

The conclusion which we have reached is supported by the language used by the supreme court of appeals, when in passing upon the question of what part of the cost of changing an "existing" grade crossing to an overhead crossing must be paid by the

city, the court says with reference to Subsection 39, in Richmond, F. & P. R. Co. v. Richmond, *supra,* at p. 253:

"It deals with 'existing crossings' as distinguished from crossings 'hereafter constructed'. It contemplated that work might or would have to be done which would result in the 'improvement' of the crossing, and it undertook to provide by whom such improvement should be paid for. It did not limit or restrict the character of the improvement. It might be the repair or the reconstruction of a crossing at grade or it might involve an overhead or underpass crossing."

(5.) The contract of 1889 between the Richmond, Fredericksburg & Potomac Railroad Company and the county of Henrico was completely abrogated by the contract of September 3, 1912, entered into between the State Fair Association, Inc., the Richmond, Fredericksburg & Potomac Railroad Company, and the board of supervisors of Henrico county, and the construction of the present bridge, if, indeed, it had not been abrogated prior to that time, and hence we deem it unnecessary to pass upon the validity of the contract of 1889.

But it is urged that the county of Henrico for a valuable consideration, by the written contract dated Sept. 3, 1912 released the Richmond, Fredericksburg & Potomac Railroad Company from the public duty to maintain and repair this bridge, and assumed that duty itself; and that this contract constituted a valid and binding release then and now. We are cited to Subsection 1, § 944a, Pollard's Code 1904, then in effect, as conferring upon the board of supervisors of Henrico county, the power and authority to make such release, and that the same is not void as against public policy.

We think that this position is not well taken. In the case at bar, it is not a question of whether or not the release was against public policy, but whether or not the power to exercise the police power of the state in this particular was delegated to the board of supervisors of Henrico county. The question at issue is one of power, not policy.

We are of the opinion that the board of supervisors of Henrico county had no power or authority to make the attempted release, and that the attempted release, for this reason, was null, void,

and of no more effect than had the contract contained no stipulation for such release.

At the time the contract of September 3, 1912, was entered into and the bridge in question constructed, the Boulevard crossing was, as we have seen, an "existing" crossing to which Subsection 39, § 1294d, Pollard's Code, 1904, was applicable; and by Subsection 39 the legislature had by a direct exercise of the police power of the state imposed upon the railroad company the positive public duty to maintain this crossing; and the board of supervisors were powerless to release the railroad company from the performance of this duty.

The law on this subject is well stated in 33 Cyc. Railroads, p. 277, where it is said:

"A distinction should, however, be made with regard to such contracts, according to whether any legal obligation already rested upon the railroad company to perform the duties therein provided for. So in cases where a railroad company constructs a bridge or viaduct pursuant to a contract with a municipality, by which the latter agrees to keep the same or its approaches in repair, if the railroad company was already legally bound to do the entire work of construction and maintenance, the contract is not only without consideration, but is one which the municipality has no power to make, and the existence of such contract will not prevent the municipality from instituting proceedings to compel the railroad company to make any necessary repairs, or impose upon the municipality any liability for injuries sustained by reason of want of such repairs, or relieve the railroad company from liability to third persons for injuries so caused" (citing Rouse v. Sommerville, 130 Mass. 361; State ex rel. Duluth v. Northern P. R. Co. 98 Minn. 429, 108 N. W. 269; State v. Minnesota Transfer R. Co. 80 Minn. 108, 83 N. W. 32, 50 L.R.A. 656.)

It is true that by subsection 1, § 944a, Pollard's Code, the state had delegated to the board of supervisors of the several counties in very general and broad language the power to exercise the police power of the state so far as it related to the control, supervision, management, and jurisdiction over the county roads.

"Sec. 944a (1) The board of supervisors of their respective

counties shall have the control, supervision, management, and jurisdiction over all the county roads, causeways, and bridges, landings, and wharves erected or repaired within this state."

But the general delegation to boards of supervisors by § 944a of the police power of the state relating to county roads is not absolute, nor of the whole of the police power of the state relating to public roads; but only of so much thereof as it not expressly reserved to the legislature, or directly exercised by the legislature, or expressly delegated to some other governmental agency. Where there is a direct exercise of the police power as to a particular subject by the legislature, or an express delegation of some part thereof to some other governmental agency, the general power and jurisdiction to exercise the police power of the state delegated to boards of supervisors is *pro tanto* ousted, or restricted. Boards of supervisors receive their delegated police power from the legislature; and they must exercise this delegated power subject to the superior authority of the legislature to legislate with reference thereto. When the legislature has in the direct exercise of the police power of the state imposed a public duty on a railroad company, as, for instance, with reference to maintaining crossings of a railroad and highways, a board of supervisors can not either for, or without, a valuable consideration, by resolution, order, or contract, release the railroad from such public duty. Any attempt to do so is void *ab initio* for lack of power to make such release.

By § 1204-b, Subsection 3, Pollard's Code 1904 (Subsec. 3, chap. 2, of an Act Concerning Public Service Corporations, approved January 18, 1904) it is provided that: "Any county road . . . may be altered by any such company for the purposes aforesaid whenever it shall have made an equally convenient road . . . in lieu thereof, the said company having first obtained the consent of the Board of Supervisors of the county to the alteration of any road or highway."

In Southern R. Co. v. Commonwealth, 124 Va. 36, P.U.R. 1919B, 460, 474, 97 S. E. 343, the court held that the duty to provide an "equally convenient" road imposed by the legislature by this subsection upon a railroad company is a public duty imposed by law; and that no consent of the board of supervisors

can relieve a railroad company of its statutory duty in such cases to provide "an equally convenient road." In passing upon this point the court says at p. 58:

"The right of the public to require the railroad company . . . to place and keep the crossings in such condition as the statute requires, has not been affected by anything the county or city has done or failed to do. No consent, therefore, of the supervisors could authorize a crossing in contravention of this provision of the statute. If given, it could not affect the rights of the public to such a highway as the statute required. Furthermore, the new road must be 'an equally convenient' road and the supervisors have no power to consent to anything less."

See 19 Ruling Case Law—Municipal Corporation—§ 110 and 7 Ruling Case Law—Counties—§ 16, where it is said:

"But since a county derives its authority from the legislature it ought not to be inferred, in the absence of clearly expressed terms in the act under which the county was organized, that the legislature has delegated to it the power to legislate concerning its local affairs in such a way as to supersede general laws, or render them unnecessary."

In McQuillin, Municipal Corp. § 647 the author says:

"Ordinances must not be inconsistent with the statutes or general laws of the state, for if they are, they will be null and void, unless they emanate by virtue of express grant of the state."

Sec. 6, Subsec. 15, Code 1887 still in effect, gives statutory recognition to this principle; and reads as follows:

"Where the council or authorities of any city or town, or any corporation, board, or number of persons, are authorized to make ordinances, by-laws, rules, regulations, or orders, it shall be understood that the same must not be inconsistent with the Constitution and laws of the United States or of this state."

See also on this subject Alleghany v. Parrish, 93 Va. 615, 621, 25 S. E. 882, and Richmond, F. & P. R. Co. v. Richmond, 145 Va. 225, 133 S. E. 800, in which later case it was held that by inclusion of "existing" crossings in cities under Subsection 39, § 1294d, Pollard's Code, the legislature had thereby taken away the power of the city of Richmond to require the Richmond, Fredericksburg & Potomac Railroad Company to pay the

whole expense of elimination of existing grade crossings, which it would have under the general delegation of power to the city in its charter except for this fact.

Chapter 106, Acts 1904 (§ 944a, Pollard's Code), Subsection 1 of which is relied upon by the railroad, itself contains several specific examples of the direct exercise of the police power by the legislature, or the express grant of some part thereof to some other governmental agency, and the consequent restriction of the general grant of power with reference to highways to boards of supervisors.

Subsec. 10 is an example of direct exercise:

"(10) Every owner or occupier of a dam, shall so far as a road passes over the same, keep such dam in good order, at least twelve feet wide at the top, and also keep in good order a bridge of like width over the pier heads, flood-gates or any waste-cut through or around the dam. . . . If he fails to comply with this section he shall be fined $2 for every failure of twenty-four hours."

Under Subsec. 32, § 944a, the exercise of the police power of the state so far as it relates to the construction of tram roads along any of the roads of a county is expressly delegated to the circuit court of the county, and thereby excluded from the police power delegated to the board of supervisors.

Under Subsec. 10, § 944a, no release of the owner of a dam by the board of supervisors of a county could absolve him from the duty therein imposed upon him or relieve him of the penalty thereby imposed for a failure to perform that duty; nor under the provisions of Subsec. 32, § 944a, would the consent of the board of supervisors for, or without, a consideration therefor, empower a person to construct a tram road along or across a public road of the county.

(6) The railroad company relies with much confidence upon the cases of Hicks v. Chesapeake & O. R. Co. 102 Va. 197, 45 S. E. 888, and Missouri, K. & T. R. Co. v. Oklahoma, 271 U. S. 303, 70 L. ed. 957, P.U.R.1926E, 268, 46 Sup. Ct. Rep. 517, as sustaining the validity of the contract of September 3, 1912, and being decisive of the case at bar. But these cases are both basicly different cases from the case at bar.

P.U.R.1928A.

In neither of these cases does it appear that at the time the contract was entered into by the railroad with the municipality, or at the time the question of repair arose, either the common law or the state statute imposed any positive public duty upon the railroad company to maintain such crossings as the municipality contracted to maintain.

As we have heretofore seen, in the Hicks case, *supra,* at the time the contract was entered into (1886) and at the time the question of its duty to repair the bridge carrying the highway across the canal arose (1903), under the common law of Virginia, then in force, no duty rested upon the Chesapeake & Ohio Railway Company, to maintain the bridge in question; but on the contrary under the common law and § 1038 (Code 1887) it was the positive duty of the town of Scottsville to maintain and repair the bridge. Judge Harrison particularly points out in the opinion that the only duty, if any, of the railroad company to repair the bridge was under the common law, and later in the opinion says, with reference to the town's contract to repair it, "it was only taking upon itself the duty and responsibility imposed upon it by the common law and by statute."

But in 1904 the legislature enacted Subsection 39, § 1294d, Pollard's Code, abrogating the common law as to the duty to improve and maintain "existing" crossings, which had been constructed at a point at which a new county road, or city or town street, had been projected across a previously constructed railroad, and making it the positive public duty of the railroad to maintain such crossings.

In the case of the Missouri, K. & T. R. Co. v. Oklahoma, *supra,* the city of McAlister had entered into a contract in 1901 for a valuable consideration with the railroad company that, if the city should desire to extend Comanche avenue across the company's right of way, an overhead crossing should be constructed at the sole cost of the city. In 1921 the Oklahoma Commission, upon the petition of the city, ordered to the company to construct an overhead crossing so as to extend Comanche avenue across the tracks of the railroad within ninety days, and that if the city and the company could not agree on an apportionment

of the cost, that the Commission would hear evidence and apportion the cost.

There is no intimation in this case that at the time the contract of 1901 was entered into there was any statute in Oklahoma making it the positive public duty of the railroad company to pay any part of the cost of constructing an overhead crossing at crossings of railroads by new county roads, or that the common law was other than in Virginia which would have required the city to have paid the cost of construction. This case was not applicable to the case at bar, in which at the time the contract was entered into there was under an express legislative enactment a positive public duty imposed upon the railroad which the county was undertaking to release by its contract.

The case of Louisiana Pub. Service Commission v. Morgan's Louisiana & T. R. & Steamship Co. 264 U. S. 393, 68 L. ed. 756, P.U.R.1924C, 860, 44 Sup. Ct. Rep. 358, has no application to the case at bar. The case merely sustains the supreme court of Louisiana in holding that the Constitution of Louisiana does not empower the Louisiana Public Service Commission to require railroad companies to repair crossings at streets or highways projected across an existing railroad within the city of New Orleans. There is no suggestion in this case that the case turns on the existence of the contract under which the city had constructed to maintain the viaduct in question; or that at the time the contract was entered into, or the question of repair arose, either the civil (common law) or statute law of Louisiana made it the positive duty of railroad companies to maintain crossings such as this bridge constituted; or that the contract of the city to repair the bridge in question would have been valid to relieve the railroad company had such duty been so imposed.

The case of Northern P. R. Co. v. Minnesota ex rel. Duluth, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341, cited by the city of Richmond, involved the same issue with reference to the validity and effect of the contract in question that is involved in the case at bar.

In this case when before the supreme court of Minnesota, the court held that both at common law in Minnesota and by its

charter the railroad company was charged with the positive public duty to repair and maintain the crossing, the highway bridge at which was in issue.

(See also State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 380, 108 N. W. 261, affirmed St. Paul, M. & M. R. Co. v. Minneapolis, 214 U. S. 497, 53 L. ed. 1060, 29 Sup. Ct. Rep. 698).

A grade crossing had existed across Lake avenue since the time that the avenue was first extended across the railroad in 1871. The city in 1891 entered into a contract with the railroad company whereby it was provided that the city should build a viaduct upon Lake avenue to carry that street over the railroad tracks, to the cost of which the railroad company was to pay $50,000; and the city agreed to maintain the part of the bridge over the railroad's right of way for fifteen years, and to perpetually maintain the approaches. In 1903 the viaduct and its approaches having become dangerous for public use, the city council passed a resolution requiring the company to repair both the bridge over its tracks and the approaches. The company refused. The city sued out a writ of mandamus, and the state court ordered the company to make the repairs at the company's cost.

Justice Day after an examination of the authorities, in delivering the opinion of the court affirming the state court, says:

"The result of these cases is to establish the doctrine of this court to be that the exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interest; and that uncompensated obedience to laws passed in its exercise is not violative of property rights protected by the Federal Constitution.

In this case the supreme court of Minnesota has held that the *charter of the company, as well as the common law, required the railroad, as to existing and future streets, to maintain them in safety,* and to hold its charter rights subject to the exercise of the legislative power in this behalf, and that any contract which undertook to limit the exercise of this right was without consideration, against public policy and void. . . . The exercise of the police power cannot be limited by contract for reasons

of public policy, nor can it be destroyed by compromise; and it is immaterial upon what consideration the contracts rest, as it is beyond the authority of the state or the municipality to abrogate this power so necessary to the public safety." (Italics ours) (At pp. 597, 598 of 208 U. S.)

(7) But though in 1912 the statutes of Virginia imposed the positive public duty on the railroad company to maintain this crossing that statute has been repealed and at the time this controversy has arisen there is no statute imposing such duty on the railroad company.

The revision of the Code (1919) and chap. 113, Acts 1926, (Amending chap. 120, Acts of 1924, carried into Michie's Code of 1924 as § 3974a) make a number of material changes in the law with respect to the duty of railroad companies to construct, improve, and maintain crossings of railroads and highways. The whole present statute law relating to the respective duties of railroad companies to construct, improve, and maintain crossings of railroads and highways is contained in §§ 3885, 3886, 3972, 3973, and 3974 (Code 1919) and chap. 113 Acts 1926 Amending chap. 120 Acts 1924 (Carried into Michie's Code 1924, as § 3974a).

Section 3885 (Code 1919) relates to the duties of railroad companies to construct at their own cost, and wholly maintain, crossings "hereafter constructed" by a railroad across a *county road.*

Section 3886 (Code 1919) relates to the duties of railroads to construct partly at their cost and partly at the cost of the county, and to wholly maintain crossings "hereafter constructed" where the public safety requires a crossing above or below grade and (1) a New *county* road is projected across a railroad, or (2) an "existing" *county* road is so changed as to cross a railroad.

Chapter 113, Acts 1926, p. 397 (amending chap. 120, Acts 1924, § 3974a, Virginia Code of 1924, Michie) relates to the duty of railroads to construct partly at their own cost and partly at the cost of the state, and to wholly maintain, overhead or underpass crossings when the public safety requires that such overhead or underpass be constructed, (1) where a new *state* road is opened across a railroad, (2) where an existing *state*

road is so changed as to cross a railroad, or (3) where an existing grade crossing of a *state* road by a railroad or of a railroad by a *state* road is to be eliminated.

Section 3972 declares the general policy of the state to be against grade crossings; and also relates to crossings "hereafter constructed." It is Subsection 38, § 1294d, Pollard's Code, copied unchanged in any particular.

Sections 3973 and 3974 were substituted for Subsection 39, § 1294d, Pollard's Code 1904, and relate to some crossing not embraced in Subsection 39, and omit all reference to some to which Subsection 39 was applicable.

Section 3973 relates to all grade crossings of a *county road* by a railroad, whether it be an "existing" crossing or a crossing "hereafter constructed," whether upon highways in existence when the railroad was constructed or upon highways thereafter laid out and constructed; and makes it the duty of the railroad company to wholly maintain such crossings for the full width of the road, and the approaches thereto for the full width of the railroad right of way.

Section 3974 relates exclusively to crossings at which there is *an elimination of "existing" grade crossings in counties, cities, and towns,* which it treats under two classes (a) those constructed prior to June 13, 1904, and (b) those constructed since June 13, 1904, it makes it the duty of the railroad company to construct such crossings partly at its own cost and partly at the cost of the county, city or town, and to wholly maintain them. It re-enacts substantially the provisions of Subsection 39, § 1294d, Pollard's Code, in so far as Subsection 39 relates to the elimination of grade crossings, with such modification in the law with reference to the elimination of grade crossings in the future as were intended to be made by the revision; and as to so much of Subsection 39, is not to be construed as an abrogation and annulment of the old statute and the enactment of a new law, but as a continuance and modification of the old law.

This rule of construction is well stated by Mr. Justice Field in delivering the opinion of the Court in Pacific Mail Steamship Co. v. Joliffe, 69 U. S. (2 Wall.) 450, 17 L. ed. 805:

"The observations of Mr. Chief Justice Shaw in Wright v.

Oakley, 5 Metc. 400, 406, upon the construction of the Revised Statutes of Massachusetts, which in terms repealed the previous legislation of the state, may with propriety be applied to the case at bar.

In construing the revised statutes and the connected acts of amendment and repeal, it is necessary to observe great caution to avoid giving an effect to these acts which was never contemplated by the legislature. In terms the whole body of the statute law was repealed; but these repeals went into operation simultaneously with the revised statutes, which were substituted for them, and were intended to replace them with such modifications as were intended to be made by that revision. There was no moment in which the repealing act stood in force without being replaced by the corresponding provisions of the revised statutes. In practical operation and effect, therefore, they are rather to be considered as a continuance and modification of old laws than as an abrogation of those old and the re-enactment of new ones." (See also Bear Lake & River Waterworks & Irrig. Co. v. Garland, 164 U. S. 1, 17, 41 L. ed. 327, 17 Sup. Ct. Rep. 7; and Ely v. Holton, 15 N. Y. 595, 598, cited with approval in Price v. Harrison, 31 Gratt. (72 Va.) at p. 122, and in Richmond v. Henrico County, 83 Va. 204, 2 S. E. 26).

In all cases expressly provided for under the present statutes it is made the duty of railroads to wholly maintain the crossing; but giving full effect to this principle of construction applicable to Code revisions, § 3974 and the other revised statutes relating to this subject have omitted all provisions of Subsection 39, § 1294d, Pollard's Code, as to the duty of railroad companies to maintain certain classes of crossings which Subsection 39 made it the duty of railroad companies to maintain, particularly, (1) crossings at grade in cities and towns and (2) crossings in counties, cities and towns of a road, street, or other highway projected and laid out across an existing railroad prior to the time Subsection 39, § 1294d, Pollard's Code, 1904, became effective, where the crossing was originally and still is above or below grade: the case at bar.

[2] Whether the former provisions of Subsection 39, making it the duty of railroads to maintain such crossings, was left out

of the revised statutes (Code 1919) by design or mistake of the legislature, this Commission has no power to supply it. It is a rule of law that when a revised statute, or one re-enacted for another, omits provisions contained in the original act, the parts omitted can not be kept in force by construction but are annulled. Omissions or failures to provide for situations which it may seem wise to have specifically provided for does not justify judicial additions to the language of a statute. (See Stewart v. Bloom, 11 Wall. 493, 20 L. ed. 176; Hobbs v. McLean, 117 U. S. 567, 29 L. ed. 175, 6 Sup. Ct. Rep. 870; Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Bardes v. Hawarden Bank, 178 U. S. 524, 44 L. ed. 175, 20 Sup. Ct. Rep. 1000; Pirie v. Chicago Title & Trust Co. 182 U. S. 438, 45 L. ed. 117, 21 Sup. Ct. Rep. 906; Gaines v. Marye, 94 Va. 225, 227, 26 S. E. 511; Somers v. Commonwealth, 97 Va. 759, 33 S. E. 381).

By Subsection 39, § 1294d, Pollard's Code, the legislature changed the Common Law Rule, and made it the public duty of the railroad company to maintain the bridge at the Boulevard Crossing here in question. As has been seen, the legislature had the power in the exercise of the police power of the state to thus change the common law and impose the duty of maintaining this crossing; and it likewise, in the exercise of the police power of the state, had the power to remove the statutory duty and leave the duty where it would rest at common law, upon the county, city, or town in which the crossing is. This it did by the repeal of the provision making it the duty of the railroad company to maintain crossings of this class.

(8) But the revision of 1919 made another material change in the law as it existed in 1912. It removed the restriction placed by Subsection 39, § 1294d, Pollard's Code, upon the exercise of the "full and complete delegation to the city of Richmond of the police power of the state over its streets," in so far as it relates to the maintenance of (1) "existing" grade crossings, and (2) crossings of roads or streets projected and laid out across an existing railroad prior to 1904, when the crossing was originally and still is above or below grade; the case at bar. (See Richmond F. & P. R. Co. v. Richmond, 145 Va. 225, 247, 253, 263, 133 S. E. 800).

[3] (9) For the reasons stated above the petition of the city of Richmond will be dismissed. But as this is a case affecting the public welfare and safety, and there may be in existence a valid ordinance of the city of Richmond imposing the duty to maintain this crossing, of which, however, this Commission can not in this proceeding take judicial notice, it will be dismissed without prejudice to the rights of the city or of the public to renew its petition to this Commission should there be an ordinance imposing such duty, or to take any other steps for the enforcement of the duty of the railroad in such case that may be provided by law.

An order will be entered accordingly. [Order omitted.]

Epes and Hooker, Commissioners: We concur in the foregoing opinion.

Note.—Crossings.

I. Jurisdiction, powers, and duties of Commissions, 321.
II. Establishment of grade crossings, 322.
III. Elimination of grade crossings, 323.
IV. Protection of grade crossings, 325.

I. Jurisdiction, powers, and duties of Commissions.

In Re Atchison, T. & S. F. R. Co. Docket No. 2952-R-254, Decision No. 4053, May 20, 1927, the Arizona Commission, in ordering changes and improvements at a point where a railroad and highways intersected, said: "The assistant superintendent of the Santa Fe insisted that the members of the city council had tentatively accepted the conditions laid down by the company for the changes and improvements at six points but the council members asserted that the acquiescence was not final or without qualifications. Since the Commission is the final arbiter on the subject, it is not of material consequence which side was right or which was in error as to the understanding had."

In Dexter v. Missouri P. R. Co. Case No. 5341, Sept. 20, 1927, the Missouri Commission approved the improvement of a former private railroad crossing which had been left open to the public for over a year and which was shown to be very hazardous. The Commission said: "The Commission has no authority to direct what shall be done with reference to a private crossing. We have no jurisdiction to order a private crossing improved or closed, and the only action this Commission can take in this cause that would be beneficial to the general public would be to order said crossing

opened to the public and placed in such condition that the existing hazard will be lessened."

An application in Re Manufacturers R. Co. Case No. 5296, Sept. 24, 1927, for authority and permission to operate locomotives and trains over a crossing of another carrier pursuant to an agreement was allowed. However, the Missouri Commission commented on a clause of the agreement as follows: "With reference to the agreement of the parties hereto that the order of the Commission herein should provide that it is made subject to the right of the city of St. Louis to revoke its permit, the Commission is of the opinion that it cannot, by order, change or modify, either by increasing or diminishing, any authority which the city of St. Louis now has or retains to revoke said permit No. 4087. The legal status of the city cannot be changed by a statement of this Commission, and it will make no order in that regard."

In Re Harrison, Aug. 4, 1927, where a railroad had entered into an agreement with a town to plank a certain grade crossing upon request by the council, the New Jersey Commission stated: "While this Board has no power to enforce this contract between the parties, the facts are admissible and competent to show a recognition on the part of the railroad of a crossing at the point in question."

In Re Carnahan Valley R. Co. Application Docket No. 17148–27, Aug. 23, 1927, it was said that the action of the Pennsylvania Public Service Commission in approving a certificate of public convenience and necessity to operate a railroad was not evidence of the Commission's approval of any crossings at grade necessitated thereby, such matter requiring separate hearings.

II. Establishment of grade crossings.

In Re Harrison, Aug. 4, 1927, the railroad had entered into an agreement with the town of Harrison to plank a certain grade crossing when required by the council. A subsequent law prohibited the establishment of new grade crossings without the permission of the Board of Public Utility Commissioners. Upon hearing of an application for the permission to plank the crossing, the Board stated: "While the general policy of the Board is opposed to the granting of new crossings at grade, it cannot be considered a fixed policy to prevent a crossing considered necessary for public use in a community where the lack of such crossing would materially affect and undoubtedly retard its industrial development. . . . The disapproval of a crossing at Second street, in view of the testimony as to the necessity therefor, would appear to seriously interfere with the development of the portion of the town of Harrison in the vicinity of Second street."

III. Elimination of grade crossings.

In Re Atchison, T. & S. F. R. Co. Docket No. 2952-R-254, Decision No. 4053, May 20, 1927, the Arizona Commission, in ordering the elimination of a railroad crossing at grade except for the passage of live stock, said: "We are in full accord with the ambition of the city of Glendale for the creation and maintenance of conditions furnishing incentive for even greater development in the future than has been witnessed during the past few years. We are sure that this same feeling exists on the part of the representatives of the Santa Fe. No action should be taken, if possible to avoid it, which would mitigate against the city in this respect, but we must now weigh against the commercial consideration, the possibility of the loss of human life and our conclusion is that humanitarian consideration must be paramount, and we, therefore, conclude and find that the crossing at D street ought to be closed except for the passage of livestock."

In State Highway Commission v. County Court, Case No. 4837, Aug. 26, 1927, the Missouri Commission ordered closed and abolished a crossing at grade 792 feet from a new underpass constructed on a state highway. The Commission decided that the safety of human life greatly outweighed the disadvantages that would accrue to the few people in the immediate vicinity by compelling them to use the underpass.

The entire expense of the construction of an overhead highway railroad crossing after deducting the amount of Federal aid is not required to be borne by the State Highway Commission on the theory that the supposed structure is a Federal aid project over a branch line track, where train movements are few and slow; but the Public Service Commission in the exercise of the police power of the state may with entire propriety apportionate the entire expense upon the railroad company where it is the presence of the railroad which makes the construction necessary. Chicago, R. I. & P. R. Co. v. Public Service Commission, No. 26881, — Mo. —, 287 S. W. 617, Aug. 16, 1926.

An order requiring the construction of an overhead crossing of a main highway over the branch line of a railroad company and requiring the railroad to bear one-third of the expenses thereof, is not unreasonable notwithstanding there is an unobstructed view of trains running either direction, where it is the policy of the state to eliminate crossings at grade. Ibid.

A State Commission in the exercise of a police power may order the separation of grades at a crossing over a railroad and apportion a part of the expense thereof against an interstate railroad notwithstanding the fact that the railroad is required to apply to the Inter-

state Commerce Commission for permission to issue securities, where it appears that the necessary fund for the construction may be raised on short time notes. Ibid.

A proper portion of the expense of the construction of approaches to a viaduct crossing over a railroad may be assessed against the railroad company although outside of its right of way. Ibid.

An order of a State Commission assessing one-third of the expense of an overhead crossing against the railroad company is not invalid on the theory that one-half of the cost of construction is paid by the Federal Government, and that, therefore, no more than one-third of the remainder should be assessed to the company, since it is within the power of the Commission to assess the entire cost against the railroad. Ibid.

In Department of Highways v. Pennsylvania R. Co. Complaint Docket No. 6520, Aug. 22, 1927, a county opposed the elimination of a township road crossing at the cost of $38,653 because it contended that the small amount of traffic and comparative danger did not warrant this expenditure. The Pennsylvania Commission, however, was of the opinion that, although a highway may not be heavily travelled, if the physical conditions of the crossing are such as warrant its elimination, such an amount to be expended is not disproportionate to the public benefit arising therefrom.

A street railway company whose tracks are on a street intersected by a railroad can be required to pay a part of the cost of a separation of the grade as a railroad in interest within the meaning of § 195.19 of the statutes. Racine v. Chicago & N. W. R. Co. (Wis.) R-3308, Dec. 23, 1926.

In Re Wisconsin Highway Commission, R-3379, Sept. 30, 1927, a town asked that an existing grade crossing of dangerous character be maintained after an overpass had been constructed at considerable expense, on the ground that the new viaduct was elevated into the wind sweep and snow would be blown clear in the winter, hampering sled traffic, and further that through traffic would use the viaduct, whereas the grade crossing would be used only by local travellers cognizant of the hazardous conditions. The Wisconsin Commission ordered the crossing closed to public use, saying: "In this particular the bridge is not dissimilar from many others now in use in other parts of the state of Wisconsin, and while the use of such a bridge may, on occasion, be somewhat more inconvenient than the use of a grade crossing, this inconvenience is, in the opinion of the Commission, of minor consideration as compared with the safety from grade crossing accidents which is obtained by the use of the overhead structure. If grade crossings are to be permitted to exist in the immediate proximity of grade separations, constructed at

large expense to both the public and the railway, the justification for the expense may well be questioned."

IV. Protection of grade crossings.

In Hansen v. Oregon Short Line R. Co. Case. F-641, Order No. 1099, Aug. 26, 1927, the Idaho Commission, finding that the condition of a grade crossing was not so hazardous as to warrant the expense of a grade separation, disapproved the installation of mechanical safety devices other than a highway warning signal. The Commission said: "The uncontradicted evidence in the case shows that bell ringing at crossings has not proven a success and is not practicable, nor is it necessary in this case in view of the regulations of the railroad company applicable to said crossing, nor is any other type of mechanical signal needed if the regulations of the railroad are complied with and the persons making use of said crossing use reasonable care in approaching the same."

In Re Maine C. R. Co. R. R. 1340, May 3, 1927, the Maine Commission denied authority to substitute manually controlled and electrically operated standard passing signals, visible and audible only, in place of present gate protection, the Commission stating: "Our study of the entire situation leads us to the conclusion that children, who are very frequent users of these crossings, are not always responsive to signals of the proposed type. While their senses, naturally alert, quickly detect the ringing of bells or the flashing of lights, familiarity with such signals has a tendency to dull their appreciation of danger. They customarily pass such points in groups on their way to and from school, and their attention may be diverted from impending danger so usual at crossings situated as these are."

In Re Chicago, M. & St. P. R. Co. A-4060, Sept. 17, 1927, the Minnesota Commission approved the reduction of track clearance for railroads of 21 feet under viaducts, prescribed in § 4758, Gen. Stat. 1923, to 17½ feet over spur tracks to be constructed for loading and unloading to serve the plant of Sears-Roebuck & Company upon a showing that crews operating over the tracks were familiar with like conditions existing elsewhere in that industrial territory. Imposing certain safety restrictions and regulations with respect to notice and operation of crews, the Commission said: "To require the statutory 21-foot clearance in the instant cases would tend to eliminate the uniformity of clearances now existing on the railroad over the portion of its line above cited, and would tend to create an additional danger to trainmen, enginemen, and others involved in the operation of trains in this territory."

In Re St. Joseph R. Light, Heat & P. Co. Case No. 5481, Oct. 12, 1927, the Missouri Commission approved the change of a former

double track line of a street railway company crossing a number of steam railroad tracks at grade to a single line where it appeared that the frogs of the track junctures were worn out and that it was agreeable to all parties—more economical, and conducive to less hazardous conditions at the crossings—to renew the track in single line.

In Dowling v. Chicago & N. W. Co. Formal Complaint No. 576, June 1, 1927, the Nebraska Commission ordered that a railroad company refrain from storing cars on any of the yard tracks within 300 feet of a crossing of a highway where there was heavy traffic; that the speed of its main line trains at the crossing should not exceed 10 miles per hour; that it should not block the crossing in switching cars, or in the movement of trains, for more than three minutes at any time; and that when switching operations were taking place, the railroad should provide some competent person to police the crossing.

In Minneapolis, St. P. & S. S. M. R. Co. v. Green Bay & W. R. Co. R-3318, Aug. 24, 1927, the petitioner, in asking for permission to install a safety system device at certain crossings contended that the respondent should bear the cost and operating expenses, being the junior road. The respondent contended that because of forty years elapsing since it had secured by negotiation the right to cross from the petitioner, additional compensation could not now be demanded. The Wisconsin Commission approved the petition on the ground of public safety and convenience and ordered as follows: "The Soo Line shall install and maintain the signals and circuits which shall provide for normal proceed and stop indications for the Soo Line and the Green Bay & Western Railway respectively. The Green Bay & Western Railway Company shall operate the switch necessary to secure the route for its own trains over the crossing."

KANSAS SUPREME COURT.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY

v.

STATE HIGHWAY COMMISSION et al.

[No. 27676.]

(— Kan. —, 255 Pac. 966.)

Crossings — Powers of Commission — Warning signals.

The statute relating to improved highways (§ 18, Chap. 264, Laws

1917), contained, among other things, the following: "The State Highway Commission, upon the request of any county or township board, may require suitable safety devices or warning signals at dangerous or obscure railroad crossings to indicate the approach of trains, which shall be installed and maintained by the railroad company." This was amended (§ 5, Chap. 245, Laws 1919), by changing the period at the end of the sentence to a semicolon and adding the following: "and the state highway Commission may require the removal of spoil banks and other obstructions to view, and the grading of approaches to the tracks; the cost of which shall be borne by the railroad company and county or township jointly or severally in the proportions determined by the State Highway Commission." *Held*, the last clause relates to the cost of the removal of spoil banks and other obstructions to view, and the grading of approaches to the tracks and does not relate to the cost of installation and maintenance of suitable safety devices or warning signals at dangerous or obscure railroad crossings.

[May 7, 1927.]

Headnote by the COURT.

PROCEEDING in mandamus to require State Highway Commission to hear case involving division of expense of safety devices and warning signals at a crossing; motion to quash alternative writ of mandamus sustained.

Appearances: William R. Smith, Owen J. Wood, Alfred A. Scott, and Alfred G. Armstrong, all of Topeka, for plaintiff; William A. Smith, Attorney General, and Roland Boynton, Assistant Attorney General, for defendants.

Harvey, J.: This is an original proceeding in mandamus to require defendants to hear evidence as to the costs and to make an order dividing the expense between the railway company and the county or township of installation and maintenance of suitable safety devices or warning signals at a dangerous or obscure improved highway-railways crossing. It is presented on defendants' motion to quash the alternative writ. The decision turned on the interpretation of the portion of R. S. 68–509, which reads as follows:

"The State Highway Commission, upon the request of any county or township board, may require suitable safety devices or warning signals at dangerous or obscure railroad crossings to indicate the approach of trains, which shall be installed and maintained by the railroad company; and the State Highway Com-

mission may require the removal of spoil banks and other obstructions to view, and the grading of approaches to the tracks; the cost of which shall be borne by the railroad company and county or township jointly or severally in the proportions determined by the State Highway Commission."

Plaintiff contends that the last clause, relating to the division of costs, applies not only to "the removal of spoil banks and other obstructions to view, and the grading of approaches to the tracks," but that it also applies to the installation and maintenance of "suitable safety devices or warning signals at dangerous or obscure railroad crossings." Defendants contend that the clause relating to the division of costs applies to "the removal of spoil banks and other obstructions to view, and the grading of approaches to the tracks" only.

The statute in question is a part of our general improved highway law of 1917 (§ 18, Chap. 264, Laws 1917), as amended in 1919 (§ 5, Chap. 245, Laws 1919), and embodied into our Revised Statutes (R. S. 68–509). As originally enacted the portion of the statute in question read:

"The State Highway Commission, upon the request of any county or township board, may require suitable safety devices or warning signals at dangerous or obscure railroad crossings to indicate the approach of trains, which shall be installed and maintained by the railroad company."

Under this statute (part of § 18, Chap. 264, Laws 1917), it was the duty of the railroad company to install and to maintain the safety devices or warning signals, at the places and under the circumstances provided in the statute. This necessarily included the duty and obligation of the railroad company to pay the cost of such installation and maintenance. The language used clearly so imports. The statute contained no other provision for the payment of such cost.

The legislature of 1919 deemed it prudent to authorize additional measures for the safety of the traveling public, whether on the highway or the railroad, at improved highway railroad crossing, and added to the then existing statute the following:

"And the State Highway Commission may require the removal of spoil banks and other obstructions to view, and the

grading of approaches to the tracks; the cost of which shall be borne by the railroad company and county or township jointly or severally in the proportions determined by the State Highway Commission."

Here were new things, not mentioned in the previous statute, to be done—"the removal of spoil banks and other obstructions to view, and the grading of approaches to the tracks"—and provision must be made for the costs thereof. Now, the spoil banks may have been made by the railway company while grading its roadbed, or by the county, or township, in grading the highway, and these facts would have a bearing on which one of them should pay for the removal; other obstructions to view may be one or more of a great variety of things, the character and location of which, and how they came to be there, would have a bearing on who should pay for the cost of removals; the nature, location, and extent of the grading of approaches to the track would have a bearing on who should pay for that. Hence, the legislature provided that who should pay the cost of these things, and the proportions of such cost, shall be determined by the Highway Commission.

There was no need for this amendment to provide for the cost of installing and maintaining safety devices or warning signals. That had been provided for by the previous statute, and the provision was complete in itself. The amendment of 1919 related to something different from safety devices and warning signals. It related to the removal of spoil banks and other obstructions to view and the grading of approaches to the tracks, and for the payment of the cost of such work, and the provision concerning these things is complete in itself.

Plaintiff relies largely on the punctuation in the statute, and particularly upon the second semicolon, and argues that the sentence as it now stands relates, generally speaking, to two things: (1) Installation and maintenance of safety devices and warning signals; and (2) removal of spoil banks, etc.—and, that the last clause relating to costs, being separated from the other two clauses by a semicolon, indicates the legislative purpose and intent that the cost of both things should be determined in the same manner. This does not necessarily follow.

The problem before us is, of course, to find the purpose and intent of the legislature in enacting the statute in question. In other words, What is the manifest purpose of the statute? Young v. Regents of State University, 87 Kan. 239, 124 Pac. 150, Ann. Cas. 1913D, 701; Gleason v. Sedgwick County, 92 Kan. 632, 635, 141 Pac. 584; Missouri P. R. Co. v. Cowley County, 103 Kan. 681, 684, 176 Pac. 99. Punctuation is important only as it aids in the interpretation of the statute. If it is ambiguous or obviously misleading it may be disregarded. State v. Deuel, 63 Kan. 811, 66 Pac. 1037. Or, perhaps more accurately, the purpose of the statute is to be determined from its obvious purpose, its history, etc., without specific reference to the punctuation used. In 25 R. C. L. 965, the rule is thus stated:

"It seems to be well settled that punctuation is a fallible standard of the meaning of a statute, and the last resort as an aid in its interpretation, though it may be resorted to as such aid when the meaning of the statute is doubtful. In the interpretation of statutes the true meaning of the lawmaker must be ascertained from the whole purview, and when that is manifest from a judicial inspection the court will not permit punctuation to control, but will disregard the punctuation of a statute or repunctuate, if need be, to give effect to what otherwise appears to be its purpose and true meaning."

To the same effect is 36 Cyc. 1126.

Here the punctuation is defective. In fact the punctuation is what gives rise to the controversy here. As passed by the legislature in 1919 (as shown by the files in the office of the secretary of state), the legislature had a period at the place of the semicolon in question, and the first word following it beginning with a capital letter. In publishing the statute some one changed the period to a semicolon and the capital to a small letter. This improved the structure of the sentence, but it would have been improved more if a comma had been used. Plaintiff contends that since the statute was re-enacted in the Revised Statutes of 1923, its history is no longer important. This contention is erroneous. For the purpose of determining the legislative purpose the history of the enactment of a statute and of its amendments

may always be inquired into. State ex rel. Coleman v. Kelly, 71 Kan. 811, 81 Pac. 450, 70 L.R.A. 450, 6 Ann. Cas. 298; Arkansas City v. Turner, 116 Kan. 407, 408, 226 Pac. 1009. See, also, Atchison, T. & S. F. R. Co. v. Board of Education, 123 Kan. 278, 255 Pac. 60.

An amendment to a statute by the addition of a new provision does not indicate a legislative purpose to change the meaning of existing provisions. Topeka v. Wasson, 101 Kan. 824, 168 Pac. 902. The adding, in 1919, of the new matter relating to spoil banks, etc., does not indicate a legislative purpose to change the duty of the railway company to install and maintain safety devices or warning signals at dangerous or obscure crossings, nor to relieve the railway company from liability for the payment of the costs of such installation and maintenance.

Plaintiff cites United States ex rel. Palermo v. Smith (C. C. A.) 17 F. (2d) 534, in which it was said:

". . . Punctuation by semicolon is indicative of a complete thought in one clause separate from the other clauses of the statute."

This was said in construing a Federal statute (Comp. St. § 4289¼jj [Act of Feb. 5, 1917, c. 29, § 19]), relating to the deportation of aliens. This definition of the use of a semicolon was properly applied in the case cited, and may well be applied to the first semicolon used in the portion of the statute in question. Obviously it cannot be well applied to the second semicolon used in the statute in question, for to do so would leave the clause, after such semicolon, nothing upon which to operate; it is not "a complete thought in one clause separate from the other clauses of the statute." This case strengthens the view that a semicolon was an improper punctuation mark to use at that place in the statute. Hence, the fact that it was used must be disregarded, and we must look to the evident legislative intent —that is, to what the legislature endeavored to accomplish by the amendment added to the statute in 1919, which we have previously discussed.

Defendants' motion to quash the alternative writ will be sustained.

NEW YORK DEPARTMENT OF PUBLIC SERVICE, STATE DIVISION, PUBLIC SERVICE COMMISSION.

RE CHARLES E. CHALMERS, Receiver of Second Avenue Railroad Company.

[Case No. 4016.]

Public utilities — What constitutes "electrical corporation" — Commission jurisdiction — Street railways.

1. Rapid transit utilities organized as "railroads" and not as "electrical" corporations for the purpose of doing a railroad business, which sell some of their surplus power chiefly to various street railway companies and their receivers are not "electrical corporations," nor, as such, subject to the jurisdiction of the Commission within the meaning of the Public Service Commission Law (§ 2, Subdiv. 13), p. 332.

Commission — Jurisdiction by statutory interpretation — Liberal construction.

2. For the purpose of ascertaining legislative intent, the Commission cannot properly pick out detached words or phrases in order to find jurisdiction in itself, without regard to the context, purpose, and intent of all the pertinent provisions of the Public Service Commission Law and all statutes, read and considered together, p. 334.

[October 26, 1927.]

PETITION of receiver of street railway for safe, adequate, and reasonable rates on power furnished by defendant railroads; dismissed for lack of jurisdiction.

By the **Commission:** In this proceeding, Mr. Charles E. Chalmers, as receiver of the properties of the Second Avenue Railroad Company in the city of New York, complains with reference to the rates charged him, as such receiver, by the Interborough Rapid Transit Company and the New York Railways Corporation, and asks that the Commission require said corporations to furnish and provide "safe, adequate, just, and reasonable electricity and electrical service, instrumentalities and facilities at just and reasonable charges, without undue or unreasonable preference, prejudice, disadvantage, or discrimination against this petitioner."

[1] The complaint is based upon the theory that the Interborough Rapid Transit Company and the New York Railways Corporation are electrical corporations.

It appears that neither of the defendant corporations was organized to do an electrical business, but that both were organized as railroad corporations, for the purpose of doing a railroad business. These corporations, however, sell some of their surplus power chiefly to various street railroad corporations and their receivers (including the petitioner herein), and it is contended by the petitioner that by reason of that fact the defendant corporations are electrical corporations and as such are subject to the jurisdiction of the Public Service Commission. This contention is based upon the wording of subdivision 13 of § 2 of the Public Service Commission Law, which is as follows:

"13. The term 'electrical corporation,' when used in this chapter, includes every corporation, company, association, joint stock association, partnership, and person, their lessees, trustees, or receivers appointed by any court whatsoever (other than a railroad or street railroad corporation generating electricity solely for railroad or street railroad purposes or for the use of its tenants and not for sale to others) owning, operating, or managing any electric plant except where electricity is generated or distributed by the producer solely on or through private property for railroad or street railroad purposes or for its own use or the use of its tenants and not for sale to others."

The exact meaning of subdivision 13 of § 2 is not entirely clear and while, if segregated and considered alone, said subdivision might possibly furnish some support for the petitioner's contention, we think that when read in connection with its context and in connection with other cognate provisions of the Public Service Commission Law and other statutes, it cannot properly be considered as applicable to the present situation. For example, in and by subdivision 1 of § 66 of the Public Service Commission Law (which is the very next section after the section under which the present petition is made) it is provided as follows:

"Section 66. *General powers of Commissions in respect to gas and electricity.* The Commission shall: 1. Have general supervision of all gas corporations and electrical corporations having authority under any general or special law or under any charter or franchise to lay down, erect, or maintain wires,

pipes, conduits, ducts, or other fixtures in, over, or under the streets, highways, and public places of any municipality, for the purpose of furnishing or distributing gas or of furnishing or transmitting electricity for light, heat, or power, or maintaining underground conduits or ducts for electrical conductors, and all gas plants and electric plants owned, leased, or operated by any gas corporation or electrical corporation."

In view of the provisions of the the above section, it would appear that the provisions of the Public Service Commission Law were not intended to be applicable to such a situation as is here presented. There is no contention that either the Interborough Rapid Transit Company or the New York Railways Corporation has any such authority as is described in § 66. Again, in respect of the furnishing of electric service, these corporations lack the usual attributes of public service corporations, and are not subject to the usual obligations of public service corporations. It is not pretended that these corporations hold themselves out as purveyors of electricity generally, or that they could be compelled to furnish electricity to the public generally, or that if they were to cut off service they could be compelled to restore the same.

[2] For the purpose of ascertaining the legislative intent, all the pertinent provisions of the Public Service Commission Law and other statutes should be read and considered together. When so read, it is apparent that there was no intention to give the Commission jurisdiction or control over such a situation as is here presented. The Commission has been frequently admonished by the courts that it has no jurisdiction except that which is clearly laid down in the statute, and that it should not "reach out for dominion over matters not clearly within the statute."

People ex rel. New York, N. H. & H. R. Co. v. Willcox, 200 N. Y. 423, 428, 431, 434, 94 N. E. 212; People ex rel. Delaware & H. Co. v. Stevens, 197 N. Y. 1, 10, 90 N. E. 60; Fort Edward v. Hudson Valley R. Co. 192 N. Y. 139, 149, 84 N. E. 962; People ex rel. Third Avenue R. Co. v. Public Service Commission, 203 N. Y. 299, 309, 96 N. E. 1011; People ex rel. New York C. & H. R. R. Co. v. Public Service Commission,

227 N. Y. 248, 256, P.U.R.1920B, 350, 125 N. E. 438; New York v. Prendergast, 202 App. Div. 308, 195 N. Y. Supp. 815.

That the subject matter of the present complaint, as against these defendants, is not "clearly within the statute," would seem to require no argument.

In this connection, it is proper to consider the practical construction put upon the statute by the public authorities charged with the administration and enforcement of the statute. For example, by subdivision 4 of § 66 it is provided that the Commission may prescribe uniform methods of keeping accounts, records, and books, to be observed by electrical corporations; by subdivision 6 of said section it is provided that the Commission may require every such corporation to file with it an annual report verified by the oath of an officer of such corporation, all such reports to be in a form prescribed by the Commission; and by subdivision 12 of the said section it is provided that the Commission may require every electrical corporation to file with the Commission and to print and keep open to public inspection schedules showing all rates and charges and all forms of contract or agreement, etc., relating to such rates or charges.

Although the Public Service Commission Law has now been in existence for more than twenty years, and although during that time orders have been made by this Commission and by its predecessors requiring electrical corporations to comply with the aforesaid provisions of the law and with other provisions of the law applicable to electrical corporations, not one of these orders ever were served upon the defendants herein or either of them. In other words, the Commission never has considered or treated these defendants as being electrical corporations.

The cases cited by counsel for the petitioner have been carefully examined and considered, but are not regarded as sustaining the contentions of the petitioner herein. "There is no rule of statutory construction which permits of the segregation of a single sentence from its context and making such isolated sentence the basis of a conclusion."

People ex rel. Board of Supervisors v. Travis, 184 App. Div. 730, 172 N. Y. Supp. 520, aff'd 226 N. Y. 703, 123 N. E. 883; Wilson v. Israel, 227 N. Y. 423, 427, 125 N. E. 819; Madison

Trust Co. v. Carnegie Trust Co. 215 N. Y. 475, 485, 109 N. E. 580; People v. McClave, 99 N. Y. 83, 1 N. E. 235; People ex rel. Kelly v. Public Service Commission, 171 App. Div. 810, 813, 157 N. Y. Supp. 703; New York v. Prendergast, *supra*.

In view of the decisions of the courts, the Commission believes that it cannot properly pick out detached words or groups of words here and there in order to find jurisdiction in itself, without regard to the context of the statute and its purpose and intent as a whole.

An order will, therefore, be entered denying the present application for want of jurisdiction.

NEW YORK SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY.

JOHN F. GILCHRIST et al.

v.

GERHARD M. DAHL.

(130 Misc. 456, 224 N. Y. Supp. 210.)

Commissions — Power to ask witness proper questions — Advice of counsel no excuse.

1. The advice of counsel is no justification for the refusal of a witness to answer legal, constitutional, and material questions of the Commission, p. 345.

Commissions — Power and duty to hold investigation and question witness — Transit matters.

2. The Commission has both the power and duty under various sections of Public Service Commission Law to hold an investigation regarding the preparation of a plan of readjustment of transit conditions and to subpoena and examine witnesses in connection therewith, p. 345.

Constitutional law — Due process — Commission questions involving personal affairs of witness.

3. The fact that a material question asked by the Commission involves "personal affairs" does not exempt the witness from a reply on the ground of the constitutional guaranty of due process, (Const. Art. 1, § 6), p. 348.

P.U.R.1928A.

Commissions — Power to determine legality and relevancy of questions asked witness.

4. Whether questions asked by a Commission of a witness during an investigation are material and pertinent must be determined by the courts upon affirmative proof, and it is not sufficient that the Commission itself or its counsel deems them so, p. 351.

Commissions — Power to question internal management — Transit investigation.

5. Where a witness has himself disregarded corporate fiction and has personally assumed all responsibility for the conduct of a corporation which he owns and its stock purchases, questions by the Commission at an investigation into transit readjustment seeking to probe further into the internal relationship are irrelevant, immaterial, and foreign, p. 367.

Commissions — Power to inquire into internal corporate relations — Transit investigation.

6. Questions by a Commission investigating activities of corporations in connection with the readjustment of transit conditions, are immaterial and irrelevant when they seek to elicit information as to when, what terms, and for what consideration, a witness purchased stock in corporations being investigated, p. 368.

Courts — Binding effect of decisions of superior courts.

7. A supreme court of New York in special term is not at liberty to disregard the ruling of five judges constituting a majority of the court of appeals of that state in a decision directly in point concerning the materiality and pertinency of certain questions asked of a witness by the Commission, nor may it adopt the views of two dissenting judges in the same case, p. 370.

Commissions — Burden of proof to show materiality of questions.

8. The burden of proof is upon the Commission to establish the materiality of the testimony sought to be elicited by interrogatories during its investigation, p. 373.

Commissions — Power to inquire into personal conduct of officers and corporations.

9. A Commission in an investigation regarding a plan for the readjustment of a transit service, may not properly inquire into the "character" or "integrity" or alleged irregularities of conduct of the management of any corporation or its officers as a means to control the future conduct of others, the proper forum for such matters being in the criminal or equity courts, p. 373.

Public utilities — Duty to divulge corporate holdings — Stockholders.

10. Public service corporations and all stockholders therein must give full and frank information as to their holdings in each other, and questions of an investigating Commission properly framed with this purpose are material, p. 376.

Commissions — Scope of interrogatory powers during investigation — Transit matters.

11. A Commission examining witnesses in a proceeding for the sole purpose of acquiring information, and material necessary for a transit readjustment plan, cannot therein conduct an investigation to determine whether a section (54, Subd. 2) of Public Service Commission Law limiting the percentage of stock which a stock company may acquire in a public utility, has or has not been violated, p. 377.

[September 15, 1927.]

APPLICATION of Transit Commission for a warrant committing witness to jail for refusal to answer certain questions; order issued as to some questions; others disallowed.

Appearances: Clarence M. Lewis, of New York city (Samuel Untermyer, Irwin Untermyer, and I. Maurice Wormser, all of New York city, of counsel), for Transit Commission; Rushmore, Bisbee & Stern, of New York city (Nathan L. Miller, Henry Root Stern, H. G. Pickering, and Bertram F. Shipman, all of New York city, of counsel), for Dahl; William D. Guthrie and Samuel Seabury, both of New York city, *amici curiæ*, for other witnesses.

Frankenthaler, J.: This proceeding under the Public Service Commission Law (hereinafter referred to as the P. S. C. Law) § 19, subd. 2, par. 2, was begun by an order to show cause issued upon the affidavit of the chairman of the Transit Commission of the state of New York, setting forth that Gerhard M. Dahl, a witness in a pending proceeding before the Commission, had refused, without reasonable or proper cause, to answer legal, pertinent, and material questions when summoned to testify before the Commission, although directed to do so. The motion is predicated also upon the entire proceedings, minutes, and exhibits before the Commission in the so-called transit investigation of 1927.

The Transit Commission was directed in 1921, by the legislature of the state of New York, to prepare a plan of readjustment for the relief of the emergency conditions which were declared by the statute enacted in that year to exist in the city of New York, and for the improvement of local transit after making the necessary studies and investigation of the situation. Laws

1921, Chap. 134, in effect March 30, 1921; Laws 1921, Chap. 335, in effect April 27, 1921; Laws 1922, Chap. 153, in effect March 22, 1922.

Before reviewing the essential elements of this legislation, a brief outline of the message of the then Governor to the legislature of the state, dated January 24, 1921 (New York Legislative Documents, 144th Session 1921, vol. 5, No. 31), may be helpful. This message relates solely to the "regulation of public utilities," and invited the legislature's prompt consideration of needed changes in the law. After setting forth that "the most urgent condition" was presented by the local transit situation, a brief outline of the legislative acts governing the subject of rapid transit lines was presented. It was indicated that the transportation problem "has steadily drifted toward disaster" (message, p. 5), that many systems have been disintegrated, and that the welfare of the entire state "is involved in the right solution of the problem."

The Governor pointed out that the problem was complicated by "a background of crooked financing" (page 6), and stated that "the time has come to protect it from the sinister designs of selfish financiers," and that it would not be difficult to eliminate their "baneful influence" (page 6).

The message went on to state that it was imperative to confer power upon some agency which would lay "solid foundations for a forward looking constructive policy," and declared that "some agency, having public confidence, impartially to ascertain the facts and courageously to apply the remedy, appears to be imperatively demanded to extricate the problem from its present difficulties."

It was further set forth that a unified system under municipal ownership might prove desirable and that it was necessary, in order to accomplish results, to vest in men of character and ability *"all the authority that can constitutionally be given."* Page 8. The Governor went on to say that "a Public Service Commission with all the power under the Rapid Transit Act, and all the power necessary to deal with the problem, appears to me to be the manifest solution." Page 9.

In this connection the Governor further said:

"The vital thing to do at the moment is to create the agency to deal with the problem with ample and undivided authority and responsibility."

The vesting of substantial powers in this Commission was emphasized; it being indicated that, "apart from the fact that the police power of the state is involved, quasi judicial powers should be vested in an impartial tribunal" (page 10), and stress was laid upon the authority, powers, and importance of the Commission to be created by the legislature under these proposals.

The legislature acted upon these suggestions, and the laws above referred to were enacted, including article 6 of the P. S. C. Law (Laws 1921, Chap. 134, in effect March 30, 1921, as amended by Laws 1922, Chap. 153, in effect March 22, 1922).

Under article 6, below the heading, "Additional Powers and Jurisdiction of Transit Commission," appear a number of sections of importance in the present controversy, including § 106, which is headed "Commission to Prepare Plan of Readjustment," § 107, which is headed "Procedure Under Plan of Readjustment," and § 108, which is headed "Additional Powers and Duties of Commission."

Before proceeding to analyze these sections, it is necessary to consider § 5-a of the P. S. C. Law, entitled "Jurisdiction of Transit Commission." It is provided in this section that "the *jurisdiction, supervision, powers, and duties* of the Transit Commission shall extend under this chapter" to various subject-matters including: "6. *To matters or subjects jurisdiction whereof is conferred on such Commission by article 6 of this chapter.*"

As already stated, article 6, which is headed "Additional Powers and Jurisdiction of Transit Commission," contains, among other provisions, §§ 106 and 108 of the P. S. C. Law, under and pursuant to which the transit readjustment plan suggested by the then Governor was to be formulated.

It will be noted that the legislature adopted the Governor's suggestion as to conferring the necessary "jurisdiction, powers, and duties," by providing that the jurisdiction of the Commis-

sion, with all its powers and duties, should extend to the matters and subjects concerning which the legislature conferred jurisdiction on the Commission by article 6, which went into effect at practically the same time as § 5-a. Manifestly, therefore, article 6, including §§ 106 and 108, must be read in the light of, and construed together with, the jurisdiction, powers, and duties conferred upon the Commission in so many words under § 5-a.

When article 6 is considered, it becomes apparent that the legislature, adopting the Governor's suggestions, intended to and did confer upon the Transit Commission broad powers and jurisdiction in order that it might formulate a plan of readjustment for the relief of the serious conditions—described, indeed, as "an emergency."

Section 106, under article 6, is entitled "Commission to Prepare Plan of Readjustment." It begins with the following words:

"The Commission *after* making the necessary studies *and* investigation shall prepare a plan of readjustment for the relief of the emergency which is hereby declared to exist, and for the improvement of transit in such city." (Italics are mine.)

The section then provides that the plan should, if possible, accomplish four main purposes stated:

"Such plan shall contain provisions, which in the judgment of the Commission, will accomplish as nearly as may be the following four main purposes: (1) The combination, rehabilitation, improvement, and extension of existing railroads so that service thereon may be increased and improved to the fullest extent possible, (2) the receipt [as soon as practicable] by the city of sufficient returns from the operation of the railroads so that the corporate stock or bonds issued by the city for the construction of rapid transit railroads may be exempted in computing the debt incurring power of the city under the Constitution of the state, and (3) the assuring to the people of the city the continued operation of the railroads at the present or lowest possible fares consistent with the just valuations of the railroads and their safe and economical operation. The Commission shall also endeavor to include in the plan of readjustment appropriate provision for the protection of tort creditors."

It was then provided that, "without limiting the authority and discretion of the Commission," the wisdom of incorporating in the plan certain specific provisions should be considered. The statute provided:

"Without limiting the authority and discretion of the Commission, it shall consider the incorporation in the plan of provisions whereby the title to such railroads as are not already owned by the city and whose ownership thereby is deemed by the Commission to be desirable may be vested in the city in return for a lease of such railroads by the city, and in the event of the incorporation of such provision in the plan the Commission shall outline an arrangement whereby outstanding securities of the railroad companies may be exchanged for new securities and the valuation of the railroads, determined as hereinafter provided, amortized."

It was further provided that, in connection with the preparation of the plan, "the Commission shall cause a valuation to be made of the property," which should take into account not only the suggestions enumerated in the statute, but also must pay "due regard to all other pertinent facts and conditions." Section 108 confers further powers and duties.

Before passing to the present investigation, which was ordered under the mandate of these provisions, it should be noted that the Commission was directed by the legislature to prepare its plan of readjustment only *after,* under the express terminology of § 106, it had (a) made the necessary studies and (b) made the necessary investigation. Studies alone were not to suffice. Investigation alone was not enough. The legislature following the suggestions of the Governor, directed in so many words that the readjustment plan for the relief of emergency transit conditions should be prepared only after *both* "necessary studies *and* investigation" should have been made by the Commission.

It is helpful to note, in connection with the correct interpretation of this terminology—if indeed there be any room at all for interpretation—that the rapid transit companies participated in the investigation conducted in the year 1921 by the Transit Commission under and pursuant to the identical article and sections of the P. S. C. Law, and that the companies at no time urged

that the Commission was without authority to conduct the investigation or to subpœna witnesses and take testimony in connection therewith. Presumably the meaning, scope, extent, and significance of article 6, embracing §§ 106 and 108, inter alia, were thoroughly understood at that time by all concerned, though now the authority of the Transit Commission to investigate and to subpœna and hear witnesses thereunder is challenged.

Under §§ 5-a, 106, and 108 of the P. S. C. Law, the Transit Commission, on May 12, 1927, made an order for the comprehensive investigation contemplated by § 106. This order, among other matters, set forth that the object was to advise and inform the Commission in respect to all facts relevant or pertinent to the plan of readjustment, which the Commission is required by the terms of the statute to prepare, and the relations of such proposed plan to each and every railroad, street railroad, omnibus line, route, person, or corporation within the jurisdiction of the Commission.

Hearings were held pursuant to this order beginning with May 23, 1927, and the investigation is still pending and undetermined.

Mr. Dahl was duly subpœnaed by the Transit Commission pursuant to § 19 of the P. S. C. Law, which provides for the attendance of witnesses, and their fees, at any investigation or hearing to be conducted by the Commission. It sets forth in subdivision 1 the essentials of subpœnas for witnesses at an *investigation* or hearing, the fees of witnesses, and the manner of service. In subdivision 2 provision is made for the prosecution of a witness for a misdemeanor in any court of competent criminal jurisdiction, if a witness, without reasonable cause, in the course of an investigation or hearing, shall refuse to be sworn or to be examined or to answer a question or to produce a book or paper when ordered to do so. The last paragraph of said subdivision 2, upon which the present proceeding to punish is predicated, is sufficiently important to warrant its full quotation. It reads as follows:

"Sec. 19. 2. . . . If a person in attendance before a Commission or a Commissioner, or an officer or employee specially authorized to conduct an investigation or hearing, refuses without reasonable cause to be examined or to answer a legal

and pertinent question or produce a book or paper, when ordered so to do by a Commission or a Commissioner, or an officer or employee specially authorized to conduct an investigation or hearing, the Commission may apply to any justice of the supreme court upon proof by affidavit of the facts for an order returnable in not less than two nor more than five days directing such person to show cause before the justice who made the order, or any other justice of the supreme court, why he should not be committed to jail; upon the return of such order the justice before whom the matter shall come on for hearing shall examine under oath such person whose testimony may be relevant, and such person shall be given an opportunity to be heard; and if the justice shall determine that the person has refused without reasonable cause or legal excuse to be examined, or to answer a legal and pertinent question, or to produce a book or paper which he was ordered to bring, he may forthwith, by warrant, commit the offender to jail, there to remain until he submits to do the act which he was so required to do or is discharged according to law."

Mr. Dahl appeared as a witness before the Commission on June 8 and 10, 1927, and, after being duly sworn, proceeded to testify. The record shows that he, as well as various other witnesses, including Mr. Wiggin (an application to punish whom for contempt has been brought on simultaneously with the present motion), were asked a large number of questions which they, including Mr. Dahl, refused to answer, although directed by the chairman on behalf of the commission to answer them, and advised by the special counsel to the Commission that the questions were material, pertinent, and necessary for the purposes of the investigation.

The witness' refusal to answer the questions is sought to be justified upon four main grounds: (a) The advice of counsel, who are said to have advised the witness that the questions need not be answered; (b) that the questions are not legal, because the P. S. C. Law neither expressly nor impliedly gives authority to the Transit Commission to hold an investigation or to subpœna and examine witnesses in connection with the preparation of a plan of readjustment of transit conditions; (c) the questions

violate the constitutional rights of the witness by prying into his personal affairs; (d) the questions were not material and pertinent to the subject of a plan of readjustment, and that, therefore, the witness' declinations to answer them were founded in reasonable cause.

Each of these objections will be considered in order.

[1] (a) The advice of counsel is no justification for refusal to answer questions, provided the questions are legal, constitutional, and material. In United States v. Sinclair, *infra,* the witness was recently convicted because of his refusal to answer questions concerning what he regarded as a prying into his personal affairs and as neither material nor pertinent to the oil inquiry being conducted by the investigating committee of the Senate of the United States, despite his contention that he had acted on the advice of an eminent member of the local bar. No amount of legal advice, no matter how distinguished, can serve to emasculate the powers of the Transit Commission or of the courts.

[2] (b) The learned counsel for the witness contends that, as a matter of law, there is no power in the Transit Commission to hold an investigation in connection with the preparation of a plan of readjustment or to subpœna and examine witnesses in connection therewith, and that the questions are, therefore, illegal and unauthorized. In this connection counsel states in his able brief:

"Neither § 106 nor any other part of article 6 contains any express grant of power or authority to the Commission to convene a hearing and subpœna and examine witnesses with respect to such plan of readjustment."

But this statement overlooks the message to the legislature, above adverted to, as well as § 5-a of the P. S. C. Law, which provides, under the heading, "Jurisdiction of Transit Commission," that the jurisdiction, powers, and duties of the Transit Commission shall extend "to matters or subjects jurisdiction whereof is conferred on such Commission by article 6 of this chapter," as well as §§ 106, 108 of article 6. It is too late to question the jurisdiction, powers, and duties of the Commission as to holding investigations or subpœnaing and examining witnesses. Further, article 6, § 106, provides that the Commission shall make an

"investigation" and shall prepare its readjustment plan in the light thereof. The verbiage is as follows:

"The Commission after making the necessary studies and investigation shall prepare a plan of readjustment for the relief of the emergency which is hereby declared to exist, and for the improvement of transit in such city."

It is clear, from the terminology thus employed by the legislature in its enactment pursuant to the Governor's message, that the Commission, firstly, should study the situation; secondly, should investigate it; and then, thirdly, should prepare a readjustment plan which should flow out of and be consequential upon the aforesaid necessary studies and investigation. If there be any doubt, that doubt must be resolved in favor of the jurisdiction of the Commission, in the light of the case of Continental Guaranty Corp. v. Craig, 240 N. Y. 354, 367, 148 N. E. 548, dealing with the construction of the *same* § 106, wherein the court of appeals stated:

"We have no desire, nor is it our intention, to place a strict construction upon this law, or the powers of the Transit Commission. In fact, we are desirous of giving to the act as broad and as liberal an interpretation as necessity requires."

See, also, Dunham v. Ottinger, 243 N. Y. 423, 154 N. E. 298.

Section 106 employs the term "investigation." This same term is repeatedly used in connection with other sections of the P. S. C. Law, including § 19, which provides for the attendance and testimony of witnesses. And the term has a well-defined meaning, denoting an inquiry by hearing witnesses, taking testimony, and receiving full disclosure. 23 Cyc. 349; People v. Sharp, 107 N. Y. 427, 450, 451, 14 N. E. 319, 1 Am. St. Rep. 851; Mora v. Great Western Insurance Co. 10 Bosw. (N. Y. Super. Ct.) 622, 628; In Re Falvey, 7 Wis. 630; Wright v. Chicago, 48 Ill. 285, 290.

Such "investigations" have been repeatedly held by the Transit Commission. Thus witnesses were subpœnaed and compelled to answer questions in connection with the Commission's inquiry into omnibus conditions in this city. Re McAneny, 215 App. Div. 797, 213 N. Y. Supp. 848.

The legislature undoubtedly intended that the Commission

should exercise a wide latitude in connection with its "investigations," for § 20 of the P. S. C. Law, which is entitled, "Practice before the Commission; Immunity of Witnesses," states that "in all *investigations*" the Commission "shall not be bound by the technical rules of evidence." If an "investigation" does not confer the right to subpœna witnesses and compel them to testify, it is hard to conceive why the legislature should have provided that investigations before the Commission shall not be hampered by the common-law "rules of evidence."

A similar view has been taken by the Supreme Court of the United States of the character, powers, and duties of the Interstate Commerce Commission. See Interstate Commerce Commission v. Baird, 194 U. S. 25, 44, 47, 48 L. ed. 860, 24 Sup. Ct. Rep. 563, 570, especially at the latter page, where the Supreme Court said:

"To unreasonably hamper the Commission by narrowing its field of inquiry beyond the requirements of the due protection of rights of citizens will be to seriously impair its usefulness and prevent a realization of the salutary purposes for which it was established."

See, also, unreported opinion of Hoehling, J., writing for the Supreme Court of District of Columbia, in United States v. Sinclair, July 14, 1924, petition for writ of certiorari denied by the Supreme Court of the United States January 10, 1927, — U. S. —, 71 L. ed. —, 47 Sup. Ct. Rep. 335.

Before passing this phase of the subject the use of the identical word "investigation" again and again in §§ 19, 20, 45, 48, and 59 leaves no reasonable doubt what the legislature intended when it employed the same term "investigation" in § 106 of article 6.

It is also contended by the witness that article 6 is isolated from the other sections and subdivisions of the P. S. C. Law, and must, therefore, be treated in legal effect as a distinct and separate enactment. The difficulty with this contention is that § 5-a of the P. S. C. Law says that the jurisdiction, powers, and duties of the Transit Commission shall extend, among other things, *"to matters or subjects jurisdiction whereof is conferred on such Commission by article six of the chapter."* P. S. C. Law, § 5-a subd. 4. The reason for this insertion was undoubtedly to avoid the neces-

sity of repeating the verbiage of the entire Public Service Commission Law for a second time in the course of the enactment of article 6.

Section 108 of article 6 confirms this conclusion, headed, as it is, "Additional Powers and Duties of the Commission," and embracing within its purview practically every statute and section bearing upon the powers of the Public Service Commission and upon the so-called Rapid Transit Act (Laws 1891, c. 4, as amended).

Furthermore, as already noted, during the course of the 1921 investigation by the Commission, which was conducted under the identical sections of the P. S. C. Law, no point was ever suggested that the Commission was without authority to conduct that investigation and to subpœna witnesses and take their testimony in the course of it. One of the participants in that investigation was the predecessor of the present Brooklyn-Manhattan Rapid Transit Company, hereinafter referred to as the B. M. T., namely, the Brooklyn Rapid Transit Company, hereinafter referred to as the B. R. T.

For the foregoing reasons it follows that the Transit Commission not only has specific power, but is expressly required, to conduct an investigation, hold hearings, subpœna and examine witnesses, and to take and study their testimony and the incidental exhibits for the purpose in connection with the studies of the Commission of preparing an appropriate plan of readjustment for the relief of the emergency transit conditions declared by the legislature in so many words to be existent in this city.

[3] (c) The eminent counsel, who appeared as amici curiæ by leave of the court, on behalf of other witnesses who have refused on their advice to answer similar questions, contend that the witnesses are protected against answering by fundamental constitutional privileges and immunities guaranteed by the state and Federal Constitutions; and, specifically, that answers cannot be compelled without violating the constitutional safeguard against deprivation of liberty without due process of law, contained in article 1, § 6, of the Constitution of the state of New York and in the 14th Amendment of the Constitution of the United States. And it is insisted by them that to compel answers

to the questions would invade the witnesses' right to liberty which, it is urged, "embraces the right to keep secret one's books and papers, his business methods, and his knowledge of his own affairs." It is also argued that the right of privacy is involved, including "the right to refrain from disclosing one's personal and business affairs," and that this right "is obviously a right of liberty and property." The scholarly briefs in which these contentions are set forth have been of great assistance.

Mr. Dahl himself objected to answer on the ground that he did not wish to disclose his "personal affairs." There is no rule of law, to quote the Supreme Judicial Court of Massachusetts, "which exempts any person from producing papers, *material* in any inquiry in the course of justice, merely because they are private." Burnham v. Morrissey, 14 Gray (Mass.) 226, 74 Am. Dec. 676. The true test is, not whether they are private, but whether they are material.

The Supreme Court of the United States has said, in Re Chapman, 166 U. S. 661, 669, 41 L. ed. 1154, 17 Sup. Ct. Rep. 677, 680, that a legislative investigation cannot be defeated on the plea, much as here, that questions which relate to "the private affairs of the witness" need not be answered, where such disclosure is necessary for the discharge of the duties of the congressional investigation. It is well settled, under modern authorities, that the courts nowadays will not take account of sentimental personal considerations as against the public interests or substantial rights. Burnham v. Morrissey, *supra;* Re Aldermen of Buffalo, 68 Misc. 478, 124 N. Y. Supp. 70; Ex parte Parker, 74 S. C. 466, 55 S. E. 122; Re Falvey, 7 Wis. 630; Re Chapman, *supra;* McGrain v. Daugherty, 273 U. S. 135, 71 L. ed. —, 47 Sup. Ct. Rep. 319; Dunham v. Ottinger, 243 N. Y. 423, 154 N. E. 298.

In the case of Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 14 Sup. Ct. Rep. 1125, the Interstate Commerce Commission, acting upon a complaint, instituted an inquiry and called one Brimson as a witness. The court upheld the statute giving the authority to compel the attendance and testimony of witnesses and the investigation, and Mr. Justice Harlan pointed out (154 U. S. 474, 38 L. ed. 1047, 14 Sup. Ct.

Rep. 1132), that the power to compel the giving of information was essential to the proper working of the Commission, in order that it might perform its duties with regard to the recommendation of congressional legislation. Mr. Justice Harlan stated as follows:

"An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce and with power to call witnesses before it, and to require the production of books, documents, and papers relating to that subject, would go far towards defeating the object for which the people of the United States placed commerce among the states under national control. All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the subject of interstate commerce cannot be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body, representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information, but of compelling by all lawful methods obedience to such rules."

See, also, Henry v. Henkel, 235 U. S. 219, 59 L. ed. 203, 35 Sup. Ct. Rep. 54, affirming (D. C.) 207 Fed. 805; Hall v. Geiger-Jones Co. 242 U. S. 539, 61 L. ed. 480, 37 Sup. Ct. Rep. 217, L.R.A.1917F, 514, Ann. Cas. 1917C, 643; Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; Brown v. Walker, 161 U. S. 591, 40 L. ed. 819, 16 Sup. Ct. Rep. 644; Re Hertle, 120 App. Div. 717, 105 N. Y. Supp. 765, affirmed 190 N. Y. 531, 83 N. E. 1126; Hirshfield v. Cook, 227 N. Y. 297, 125 N. E. 504.

In the case of Dunham v. Ottinger, *supra,* at p. 434, a statute far more drastic and inquisitorial than the P. S. C. Law provisions was upheld by the Court of Appeals, Chief Judge Hiscock writing for the unanimous Bench, and it was said:

"The power to investigate and examine witnesses to the end of a better discharge of their duties has been conferred upon administrative boards and officials without successful challenge by so many statutes that it is undesirable to refer to them all."

It is not deemed necessary further to consider the plea of "private affairs," because under the recent authorities above cited it is too late to contend at this point in the development of our constitutional jurisprudence that the power herein contended for on behalf of the Commission is illegal. Nor can a witness nowadays refuse to answer on the plea that the questions concern his so-called "personal affairs," where they also concern the most vital interests of the general public in a matter directly relating to the health, welfare, and general well-being of every citizen of this great city under conditions amounting, in the language of the legislature of the state, to a serious "emergency," provided always that the questions are established to be pertinent and material. When private affairs come into conflict with the public interest, the latter, and not the former, must prevail.

The early cases cited by the distinguished counsel for the witness, as for example, Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377, are inapplicable to the present case, and were decided at a date long before the courts had taken vigorous and comprehensive strides to combat the frustration of public authorities, such as the Interstate Commerce and Transit Commissions in the performance of their vital and important functions.

For these reasons the contention on the part of the witness that the attempted grant and exercise of the subpœna power was in violation of the constitutional right of privacy of the witness and deprived him of his liberty and property without due process of law must be overruled.

[4] (d) The final and most serious point urged on behalf of the witness is that the questions in dispute were not material and pertinent to the subject of a plan of readjustment, and that, therefore, the declinations to answer were founded upon reasonable cause and legal excuse. The Commission, on the other hand, contends that the questions were material, appropriate, legal, and pertinent to the investigation, and that the refusal of the witness to answer them, emphasized by the refusal of other witnesses in alleged community of interest with him to answer similar questions, was without reasonable cause or legal justification, and that to deprive the Transit Commission of the benefit of the answers of the witness would tend to foreclose its formulation of an

appropriate plan of readjustment of transit conditions pursuant to article 6 of the P. S. C. Law.

It is fundamental that the questions must be affirmatively shown to be material and pertinent to the purposes of the pending investigation. People v. Foster, 236 N. Y. 610, 142 N. E. 304. It is not sufficient that the Commission itself or its special counsel deems the questions legal and pertinent. That is a question for the court to decide as a matter of law.

In Re Barnes, 204 N. Y. 108, 125, 97 N. E. 508, 513, the term "legal and pertinent question" was defined as follows by Judge Werner:

"What is a legal and pertinent question? Obviously one that violates no legal right of the witness, and that is pertinent—that is, relevant and material—to the purpose of the proceeding or investigation in which the witness is being examined. . . . It seems to me that the plain import of the words 'legal' and 'pertinent' as used in the statute is to confine the proceeding within lawful bounds and proper methods with respect to the legal rights of the individual who is called upon to testify. . . ."

Whether the question is legal and pertinent was stated by Judge Werner, at the same page, to be a purely legal question for determination by the courts.

"Who is to be decide whether a question is legal and pertinent? If a legislative committee or its counsel are to be the final arbiters upon this important limitation, it is an idle ceremony to appeal to the courts, . . . and when he [the witness] challenges the legality and pertinency of the information sought from him, it presents a question of law for the courts to decide."

So far as these rules of law are concerned, opposing counsel are apparently in accord. Where counsel diverge is in their views of the materiality and pertinency of the testimony sought to be elicited by the questions.

The questions which in the course of the investigation the witness Dahl refused to answer, although directed to answer them, on behalf of the Commission by its chairman, Mr. Gilchrist, are grouped in the chairman's affidavit as follows:

(1) Dahl refused to answer questions as to whose bank account Waubesa Corporation dividends were paid into:

"Q. And put into her bank account? A. I decline to pursue the dividends of the Waubesa Corporation to Mrs. Dahl.

"Q. The question is whether or not these dividends were paid over to you? A. I told you they were paid over to Mrs. Dahl.

"Q. Were they put into her bank account? A. I decline to answer the question.

"Mr. Untermyer: I ask that the witness be instructed to answer the question.

"Chairman Gilchrist: You are instructed to answer the question.

"The Witness: I decline to answer the question because I consider it not pertinent or relevant, and that it has nothing to do with this inquiry.

"Q. Is the money put into your bank account? A. What money?

"Q. The dividends? A. I decline to answer that question.

"Q. You decline to answer? A. Certainly."

(2) Dahl refused to answer questions as to whether moneys were borrowed to carry stock by Waubesa Corporation:

"Q. Are there moneys that are borrowed to carry stock by the Waubesa Corporation? A. I decline to answer that question.

"Q. Or are they borrowed by you? A. I decline to answer that question."

(3) Dahl refused to answer questions as to whether the Waubesa Corporation has dealt in anything but stock exchange securities:

"Q. Now, has it dealt in anything except stock exchange securities, and dealing in the market? A. Yes.

"Q. In what has it dealt besides that? A. I decline to answer."

(4) Dahl refused and declined to produce the minutes of the Waubesa Corporation:

"Q. We would also like to have you produce the minutes of the Waubesa Corporation? A. The minutes of the Waubesa?

"Q. Yes. A. I shall decline to do that.

"Q. We are going to try to require you to. A. Yes; I appreciate that, Mr. Untermyer."

(5) Dahl refused to answer questions as to the date when he

began accumulating 72,000-odd or 77,000-odd shares of B. M. T. stock:

"Q. All right. When did you begin accumulating this 72,000 shares of common stock of the B. M. T.? A. I respectfully decline to answer that.

"Q. Or 77,000 shares? A. I respectfully decline to answer that question."

(6) Dahl refused to answer questions as to whether "did you buy and sell in market:"

"Q. Did you buy and sell in the market? A. I respectfully decline to answer that question.

"Q. Have you been trading in and out of the market on B. M. T. and I. R. T. for the last six months? A. I respectfully decline to answer that question.

"Mr. Untermyer: I ask that the witness be instructed to answer these questions.

"Chairman Gilchrist: You are instructed to answer the questions.

"The Witness: I regret to say that I still must respectfully decline to answer."

(7) Dahl refused and declined to answer questions as to the status of the stock in the Waubesa Corporation, and whether in his own name:

"Q. As I understand you, you decline to answer any of these questions in respect to dealings in stock in the name of the Waubesa Corporation as though they were transactions in your own name, do you? A. I do not know what you mean.

"Q. Well, you do decline to answer, do you not? A. I decline to answer for the reasons stated.

"Q. You decline to answer as to the Waubesa Corporation? A. Exactly, and I decline to answer as to my personal transactions. You asked me as to my personal dealings, and I declined to answer that.

"Q. Now I am asking you as to transactions with the Waubesa Corporation? A. I decline to answer.

"Q. You decline to answer those, too? A. Yes.

"Q. On what ground? A. On the ground that it is neither pertinent, relevant, nor material to this inquiry."

(8) Dahl refused and declined to give information as to how much money was put into the Waubesa Corporation:

"Q. Will you get us the information as to how much money was put into this corporation? A. Oh, no; I won't do that.

"Q. You will not give that, and you do not know whether there was any or not? A. I know that there was property turned over at the time of the organization of the corporation.

"Q. What was it? A. I decline to answer that.

"Q. Was it $100 worth? A. I decline to answer that."

(9) Dahl refused and declined to answer questions as to the date when he gave the order on behalf of the B. M. T. to purchase 19,650 shares of I. R. T. stock:

"Q. Did you give the order for the purchase of the nineteen thousand and odd shares of stock of the I. R. T. by the B. M. T.? A. Yes, sir.

"Q. Sir? A. Yes; I did.

"Q. When did you give that order? A. I decline to answer that question.

"Q. Why? A. Because it is neither relevant nor pertinent; has nothing to do with this inquiry.

"Mr. Untermyer: I ask that the witness be instructed to answer.

"Chairman Gilchrist: You are instructed to answer the question.

"The Witness: I still decline to answer.

"Q. You still decline? When did you begin buying? A. Same answer, Mr. Untermyer."

(10) Dahl refused and declined to answer questions as to whether while buying for the B. M. T. Company, he was also buying for the Waubesa Corporation:

"Q. While you were buying for the company, you were also buying for the Waubesa Corporation, were you not? A. I decline to answer as to when I bought for the Waubesa Corporation or when I bought for the company.

"Q. Were you buying yourself, or the Waubesa Corporation, at the time you were buying for the B. M. T.? A. That is the same question which I declined to answer a little while ago. I still decline to answer."

(11) Dahl refused and declined to answer questions as to whether or not he was selling I. R. T. stock:

"Q. Were you selling? A. I decline to answer that question.

"Q. Did you also make sales for the B. M. T. during the same period of I. R. T. stock? A. That is the same question that I declined to answer, and I repeat my declination on the same grounds.

"Q. The chairman instructs the witness to answer, and the witness declines to answer, is that right? A. Correct.

"Q. You will not even tell us whether you sold I. R. T. stock for the B. M. T. within the last ninety days? A. I have already declined."

(12) Dahl refused and declined to answer questions as to whether 19,650 shares of I. R. T. stock was all which the B. M. T. purchased in the last three months, as to whether the B. M. T. sold any, and as to dates and amounts and prices of various purchases:

"Q. All it purchased within the last three months or six months? A. That is the total stock which the B. M. T. owns in the Interborough Rapid Transit to-day.

"Q. You have said so before, but it does not answer my question. A. I decline to answer that question.

"Q. You decline to answer as to how much stock the B. M. T. has purchesed in the Interborough Rapid Transit within the past three months, do you? A. I do, except that it has purchased and owns 19,600 shares.

"Q. Well, has it purchased more? A. I decline to answer that.

"Q. Has it sold any? A. I decline to answer that.

"Q. Has it been engaged in the purchase and sale of the I. R. T. stock within the last three months? A. I decline to answer that.

"Q. You decline also to tell us the dates and the amounts of those various purchases? A. I do.

"Q. And the price at which the purchases were made? A. I do.

"Q. And you decline to answer all these questions as to the

purchase and sale of B. M. T. stock within the three last months or the stock that it now owns—

"Commissioner Godley: I. R. T. stock.

"Q. (Continuing) I. R. T. stock, upon the same grounds that you stated at the hearing the day before yesterday? A. No; that it is irrelevant.

"Q. No. Is it based on the same ground? A. I prefer that you let me state my grounds, now.

"Q. Don't you think it better to have those deemed repeated in the record? A. Yes; I think that is all right.

"Mr. Miller: Oh, yes; it is.

"Q. You read a statement?

"Mr. Miller: No; he did not.

"The Witness: I did not read a statement.

"Q. Would you like to repeat the grounds on which you have refused to answer these questions as to the total purchases of I. R. T. stock by the B. M. T. within the last ninety days, as to prices, time at which they were purchased within that period, as to the amount of stock of the I. R. T. sold by the B. M. T. during that time showing this balance of 19,600 shares? A. My declination as to all of these questions is based upon the ground that it is entirely irrelevant legally and incompetent to the inquiry.

"Mr. Miller: May I add an additional ground?

"Mr. Untermyer: Yes.

"Mr. Miller: That the subject of the inquiry is not within the jurisdiction of the Commission.

"The Witness: Yes.

"Mr. Untermyer: May it be deemed and taken that the chairman has instructed the witness to answer each of these questions separately, and that the witness, after the instructions of the chairman to answer each of the questions, has delined as to each of the questions to make answer on the grounds stated?

"Mr. Miller: Surely.

"By Mr. Untermyer: Q. Is that correct, Mr. Dahl? A. That is correct.

"Chairman Gilchrist: It may be so stated on the record.

"Q. You decline to give any information, do you, as to your dealings in that stock within the last ninety days? A. Yes, sir.

"Q. As to how much you have owned and bought and sold? A. I decline to give you any information except the information that has been given to you as to the ownership of the B. M. T.; the number of shares owned, the price or anything else I decline to give.

"Chairman Gilchrist: I instruct you to answer.

"The Witness: I decline to answer."

(13) Dahl refused and declined to answer questions as to whether he borrowed money from the Chase National Bank to buy I. R. T. stock:

"Q. Did you borrow the money from the Chase National Bank with which to buy this I. R. T. stock by the B. M. T.? A. I decline to answer that question.

"Q. The same direction, and the same refusal? A. Yes.

"Q. At that time, didn't the B. M. T. borrow the money from the Chase National Bank with which to take up the stock? A. I decline to answer that question.

"Q. I would like to know particularly as to how much it borrowed with which to take up the Interborough stock from Hayden, Stone & Company? A. I decline to answer that question."

(14) Dahl declined and refused to answer questions as to how much I. R. T. stock the B. M. T. has owned at any one time:

"Q. And when you said that the B. M. T. only acquired 6 per cent of the stock of the I. R. T. you meant, did you not, that that is all it owned at the present time? A. I have never said anything else on the subject, except that that is what it does own at the present time.

"Q. But how much has it owned at any one time? A. The declination is on the same ground."

(15) Dahl refused and declined to answer questions as to how much I. R. T. stock the B. M. T. has sold in the last three months:

"Q. No; but how much they have owned: You won't tell us how much I. R. T. stock they have sold within the last three months; you will not tell us that? A. I decline to answer the question.

"Q. Whether or not they have been trading in and out of the

market within that time in I. R. T. stock you won't tell us? A. I decline to answer the question."

(16) Dahl refused and declined to answer questions as to whether the B. M. T. Company and Messrs. Dahl, Chadbourne, and Wiggin have been trading in and out of the market in I. R. T. stock in the last ninety days:

"Q. Whether you, Mr. Chadbourne, and Mr. Wiggin have been trading in and out of the market in Interborough stock at the same time, you won't tell us? A. I decline to answer the question.

"Q. All on the same grounds? A. All on the same grounds.

"Mr. Untermyer: I ask the chairman to instruct the witness to answer these questions.

"Chairman Gilchrist: You are instructed to answer the questions.

"The Witness: I respectfully decline."

(17) Dahl refused and declined to answer questions as to how long the brokerage firm of Hayden, Stone & Company have been carrying I. R. T. stock for the B. M. T. Company:

"Q. Hayden, Stone & Company had been carrying this I. R. T. stock for you, had they not? A. Until it was taken up on May 10.

"Q. How long had they been carrying it? A. I decline to answer that question.

"Q. Why, because it might disclose when you— A. I decline answer that question on the same grounds stated.

"Q. And do you decline to tell us (I would like this specifically) anything about the time, the dates, the amounts, prices, the circumstances under which the B. M. T. acquired this Interborough stock? A. I decline to tell you anything about it except, the amount of stock which we now own and what it cost us, on the same ground.

"Q. Yes.

"Mr. Untermyer: I ask that the witness be required to answer that question.

"Chairman Gilchrist: You are instructed to answer that question.

"The Witness: The declination is the same."

(18) Dahl refused and declined to answer questions as to whether the certificates in the Waubesa Corporation, which is Dahl's family corporation and dominated by him, were indorsed in blank:

"Q. You do not have these stock certificates wandering around. They are indorsed in blank? A. I may have a couple of boxes. I do not know how many.

"Q. They are indorsed in blank? A. I decline to answer that question.

"Q. But they are indorsed in blank and put in your possession so as to be negotiable? A. I said to you that I decline to answer your question.

"Mr. Untermyer: I ask that the witness be required to answer the question.

"Chairman Gilchrist: I instruct the witness to answer.

"The Witness: I respectfully decline to answer."

(19) Dahl refused and declined to answer questions as to whether he directed the purchase by the B. M. T. Company of I. R. T. stock after he had acquired his own I. R. T. stock:

"Q. Do you decline also to tell us whether you authorized or directed the purchase by the B. M. T. of I. R. T. stock after you acquired your I. R. T. stock? A. I decline to answer.

"Q. Don't you see what the bearing of that might be? A. I see perfectly.

"Q. And you do not think you want to give that information? A. Exactly.

"Q. As to whether you bought for yourself first and bought for the company later? A. Exactly.

"Q. You do not want to give that information? A. I decline to answer the question."

(20) Dahl refused and declined to answer questions as to whether he had been in the stock market the last day or two:

"Q. Have you been in the market in the last day or two? A. Oh, that is something I won't tell you.

"Q. What? A. That is something I won't tell you.

"Q. You decline to answer that? A. Yes."

(21) Dahl refused and declined to answer questions as to the

dates and prices of purchases of B. M. T. stock, totaling about 89,000 shares:

"Q. How long have you held them? A. I decline to answer that.

"Q. When did you buy them; how much did you pay for them? A. I decline to answer."

In order to resolve the problem of materiality and pertinency, it is necessary to review some of the facts disclosed in the voluminous volumes of testimony.

The Brooklyn-Manhattan Transit Company, ordinarily referred to as the B. M. T., is a corporation organized under the Stock Corporation Law of this state. Its rapid transit lines consist of the so-called Brooklyn subways, which are owned by the city, and certain elevated lines, some of which are owned by subsidiaries of the B. M. T. and some by the city. The subways are leased to the New York Rapid Transit Corporation, a subsidiary of the B. M. T., and all of whose stock and bonds are owned or controlled by it. These subways are subject to the city's right of recapture at cost, plus 15 per cent. The chairman of the Commission deposes that a proposition to recapture them may constitute a substantial portion of the readjustment plan to be formulated by the Commission. At the present time the B. M. T. pays dividends of 6 per cent per annum on its preferred stock and 4 per cent per annum on its common stock. It apparently is in good financial condition, and its subway lines at least are profitably operated.

The Interborough Rapid Transit Company, usually referred to as the I. R. T., operates rapid transit lines in Manhattan, in the city of New York and into Brooklyn. It is a public service corporation. The title to the lines is vested in the city, which has given a lease thereof subject to the right of recapture of that portion of the subways built under the so-called "dual contracts." The I. R. T. subway earnings would entitle it to pay substantial dividends. While the I. R. T. in the past has paid well, at the present time it pays no dividends and concededly is without prospects of paying any. Practically all its substantial subway earnings are absorbed by its guaranty of 7 per cent, subsequently

reduced to 5 per cent on the $60,000,000 of outstanding stock of the Manhattan Elevated Lines operating the elevated railroads.

Dahl is chairman of the board of directors of the B. M. T. Corporation, and, according to Marston, its secretary treasurer, is the "guiding genius" of the company. He was formerly a vice president of the Chase National Bank, of which the witness Wiggin, who made much similar refusals to answer, was formerly president and is now chairman of the board of directors. The Chase National Bank financed some of the stock transactions of the B. M. T., including those in the I. R. T. stock. Dahl was also formerly a partner in the stock brokerage firm of Hayden, Stone & Company. Through this firm large amounts of traction stock appear to have been purchased by Dahl and other stockholders in the B. M. T., and a large volume of such stock stood in its name until recently.

Dahl's family corporation, the so-called Waubesa Corporation, owns 77,083 shares of B. M. T. common stock and 12,436 shares of B. M. T. preferred stock. It also owns 6,600 shares of I. R. T. stock. While Dahl first testified that his wife owned all the Waubesa Corporation's stock, he ultimately conceded on the record that he assumed as full responsibility as though he owned it individually.

By the admission of Dahl and another witness, Wiggin, the B. M. T. and the I. R. T. are competing companies.

The purchases of all stock by the B. M. T., including its purchases of I. R. T. stock, were made by Dahl's directions, and he acted on its behalf in making them. It is conceded by the B. M. T. that it now owns about 19,650 shares of I. R. T. stock. Whether it recently has owned more, and whether it may even now own more, is shrouded in some doubt. The refusals to answer, above adverted to, make it impossible to state definitely.

Dahl first testified that he bought I. R. T. stock on behalf of the B. M. T. because he regarded it as "a good buy" and believed that ultimately there would be consolidation, with a raised carfare, and denied purchasing the stock for obstructive purposes in connection with the proposed plan of readjustment. However, he admitted towards the close of the hearings that the purchase was made in order to give the B. M. T. a "voice" and influence in the

contemplated dealings between the Commission and the I. R. T. with relation to the proposed readjustment plan.

The status of Wiggin reflects considerable light on Dahl's refusals to answer. Wiggin, an associate of Dahl in the directorate of the B. M. T., is chairman of the board of directors of the Chase National Bank and also chairman of the finance committee of the B. M. T. He is a director of the New York Rapid Transit Corporation, which is dominated and controlled through stock ownership by the B. M. T. The B. M. T. has close relations with the Chase Bank. At present it has some $3,200,000 outstanding there in loans. The Chase Bank loaned $900,000 to the B. M. T. on May 10, 1927, secured by stock of the I. R. T. Company. It was about that date that this stock was taken up by the B. M. T. from the stock brokerage firm of Hayden, Stone & Company, of which Dahl was at one time a member. Dahl was also formerly a vice president of the Chase National Bank. Wiggin owns 20,000 shares of the preferred stock of the B. M. T. and 38,500 shares of common stock. He also owns 3,600 shares of the I. R. T. stock.

Mr. Chadbourne, a New York attorney, associated with Dahl and Wiggin in the B. M. T. Company as a large fellow stockholder, but not an officer or director, owns 72,216 shares of B. M. T. common stock and 9,800 shares of I. R. T. stock. Chadbourne made refusals to answer questions substantially similar to those on the part of Dahl and Wiggin.

A large proportion of the stock of the I. R. T. was and still is in the names of brokers. The owners in fact are undisclosed. Much of the traction stock purchased and owned by Dahl, Wiggin, and Chadbourne, was, until immediately prior to the date of the present investigation in the name of local stock brokers, including Hayden, Stone & Company.

The record indicates that Dahl, Wiggin, and Chadbourne recently purchased a large block of stock of the I. R. T. on their own behalf, and that a considerable amount was also bought on behalf of the B. M. T. With reference to the objects and purposes of the B. M. T. in connection with these purchases and sales, the testimony of its secretary treasurer, Marston, and of Wiggin, is illuminating. Marston stated that the B. M. T. at the

time of his testimony owned 19,650 shares of I. R. T. stock. He also stated that the two companies are competing lines, at least in Manhattan, and both Wiggin and Dahl agreed with him in this respect. Marston did not know who gave authority on the part of the B. M. T. for the purchase of its stock in the I. R. T. According to him, there were made no written entries of the transaction in its books. Dahl, the chairman of the board, simply stated to Marston he had bought the I. R. T. stock for the B. M. T. and had consulted with four of the six members of its finance committee, including Wiggin, the chairman, before making the purchase. Dahl did not state when he purchased the shares. The executive committee of the B. M. T. ratified Dahl's action in purchasing this stock on May 9, 1927. On the following day the stock was taken up by the B. M. T., through the Chase National Bank, from the stock brokerage firm of Hayden, Stone & Company. The bill of the stockbrokers, rendered to the B. M. T. Company, showed no dates of the purchases of the I. R. T. shares, but merely gave their number and average price. That there were opportunities for "irregularities" in this method of doing business was admitted by Marston.

Dahl in his testimony conceded he gave the order as chairman of the board of the B. M. T. for the purchase on its behalf of the I. R. T. shares referred to by Martson, but refused to testify when or under what circumstances he began this purchasing. He also refused to state how many shares beyond 19,650 the B. M. T. had purchased in the I. R. T. He refused to state whether the B. M. T. was recently engaged in purchasing and selling I. R. T. stock, though admitting that all such purchases and sales are made by his direction and under his auspices. He further refused to state how much I. R. T. stock had been owned by the B. M. T. at any one time, and to what extent the B. M. T. sold I. R. T. stock during the three months preceding his testimony on June 8 and 10, 1927, and whether he had made sales of I. R. T. stock for the B. M. T. within that period. He did claim, however, that he was "quite certain" it now owns 19,600 shares.

The refusals on the part of Dahl were accompanied by refusals on the part of Wiggin, Chadbourne, and other witnesses.

Wiggin, in the first part of his testimony, agreed with Dahl's

statement that the purchases of the I. R. T. stock were made by the B. M. T. because they were a "good buy" and because of his belief in ultimate consolidation of the companies and a raised carfare. Both witnesses at first denied that the purchases of I. R. T. stock were made by the B. M. T. for any obstructive purposes. Indeed, Wiggin first claimed that the B. M. T. purchases of shares of stock in the I. R. T. were made because they were "an *excellent investment* for the B. M. T." It appeared from the later testimony of Wiggin, and ultimately from the testimony of Dahl as well, that the purchases in fact could hardly be deemed "a good buy" or "an excellent investment," but were made for other reasons, including, according to Wiggin, the purpose of influencing the dealings between the Transit Commission and the I. R. T. pursuant to any contemplated plan of readjustment. Wiggin, after first stating that he knew the I. R. T. stock paid no dividends, and that he saw no hope of such except in the event of increased carfare, and that he knew the I. R. T. had been "in dire straits," testified that he had in mind, when the I. R. T. stock was purchased by the B. M. T., that it (the B. M. T.) should have "a voice" in the treatment of the I. R. T. by the Transit Commission and the city.

Wiggin's testimony on this subject is as follows:

"Q. So you bought in in order to have an influence, did you, on the negotiation between the city and the Interborough Rapid Transit? A. *We hoped we might have some influence.*

"Q. I say you bought in for that purpose? A. We hoped we might have some influence.

"Q. I say you bought in for that purpose? A. Not entirely.

"Q. No; but you bought in order to influence that negotiation? A. *In order to have something to say.*

"Q. If you had not bought in, you would not have cared whether the city made a good bargain or a poor bargain, would you? A. Yes; indeed, I would.

"Q. From what point of view? A. Because we are in the same line of business.

"Q. But suppose the city did not want your property, but did want the other, why should you be interested in the fate of the I. R. T.? A. Because we are in the same line of business.

"Q. They are competitors, aren't they? A. Well, hardly. *Yes; there are some lines that are parallel.*

"Q. So you bought in for the purpose of having a say as to what the city could accomplish with your competitors? A. *We hoped to have something to say.*

"Q. And so that if the city made too good a bargain with the I. R. T., or the I. R. T. made too poor a bargain, you could come in and stop it? A. I do not know what our powers would be. I do not know what power we would have.

"Q. Whatever power you would have, you would try to exercise? A. *We would try to see that it was a fair trade.*" (Italics mine.)

Wiggin further admitted that the I. R. T. stock purchases were made by the B. M. T. so that the B. M. T.'s "influence" might thereby be employed to "partially" obstruct any dealings between the Transit Commission and the I. R. T. unless the I. R. T. was to secure from the city a sum which Wiggin might regard as a fair price. Wiggin's testimony in this respect reads as follows:

"Q. But when you bought for the B. M. T., you had in mind that it should have a say in the negotations between the city and the I. R. T. for the purchase of that property? A. *That it should have a voice.*

"Q. A stockholder's voice? A. Yes, sir.

"Q. *So that, if you thought the price was not fair, you could use your influence to stop it?* A. *Yes, sir.*

"Q. *Stop the sale?* A. *Yes, sir.*

"Q. *So that your real purpose was to obstruct the dealings between the city and the I. R. T. unless you believed that the I. R. T. was getting what you regarded as a fair price?* A. *Partially.*" (Italics mine.)

It becomes quite manifest from these admissions, and from similar ones made by Dahl in his testimony on July 22, 1927, that the I. R. T. stock was purchased by the B. M. T., in part at least, in order to influence and partially to obstruct the negotiations between the I. R. T. and the city, by which Wiggin and Dahl presumably meant the Transit Commission.

With this background in mind, the specific questions must now be considered.

In the helpful brief submitted by Dahl's learned counsel, the twenty-one groups of questions set forth under the Commission chairman's headings above quoted are grouped in the following order, which, for purposes of convenience, may well be adopted:

"1. *Questions as to Waubesa Corporation.* Gilchrist headings (1), (2), (3), (4), (7), (8), (10), and (18).

2. *Questions as to when Dahl bought and how much he paid for the stock of the B. M. T. or I. R. T. which he (or the Waubesa Corporation) owns at the present time.* Gilchrist headings (5), (19), and (21).

3. *Questions as to when the B. M. T. purchased its holdings of I. R. T. stock, the dates and amounts of specific individual purchases making up its admitted present holding of 19,650 shares, and how much I. R. T. stock the B. M. T. has owned at any time prior to the present time.* Gilchrist headings (9), (12), (14), and (17).

"4. *Questions as to antecedent buying and selling in the market by Dahl or the B. M. T. or others in either B. M. T. or I. R. T. stock.* Gilchrist headings (6), (11), (15), (16), and (20).

"5. *Questions as to money borrowed by the B. M. T. to buy I. R. T. stock.* Gilchrist heading (13)."

[5] The questions in group 1, relating to the Waubesa Corporation, covered by Gilchrist heatings (1), (2), (3), (4), (7), (8), (10), and (18), need not be answered for the reason that, while Dahl apparently evaded the issue in his early answers, declaring that his wife owned all the corporate shares, he ultimately assumed full responsibility for the Waubesa Corporation and its stock purchases, and stated that he was willing, for the purpose of this proceeding, that it should be considered as though he personally owned all the Waubesa shares. The above subheadings relate to such questions as into whose bank account the Waubesa Corporation dividends were paid; whether these dividends were put into Mrs. Dahl's bank account or into Dahl's; whether the Waubesa Corporation borrowed money to carry stock purchased

by it; whether the Waubesa Corporation had dealt in anything but stock exchange securities; whether Dahl would produce the minutes of the Waubesa Corporation; what was the amount of money put into the Waubesa Corporation; whether the share certificates in the Waubesa Corporation were indorsed in blank and put into Dahl's possession so as to be negotiable by him. It is not material or necessary to investigate this subject, because Dahl has affirmatively assumed responsibility for the Waubesa Corporation and its doings. Under these circumstances there is no need for going into the affairs of the witness in connection with the Waubesa Corporation. They are irrelevant, immaterial, and foreign in the light of the witness' final admission.

[6] The next, and second, group of questions relate to when Dahl bought and how much he paid for the stock of the B. M. T. or I. R. T. which he, or the Waubesa Corporation, which he controls, owns at the present time, comprising Gilchrist headings (5), (19), and (21).

Gilchrist heading (5) refers to a question which asks when Dahl began accumulating the shares of common stock of the B. M. T. which he stated and admitted he now owns. Heading (19) is along the same line, inquiring whether he directed the purchase by the B. M. T. of I. R. T. stock after he had acquired his own I. R. T. stock, and whether he bought for himself first and for the B. M. T. Company later. Gilchrist heading (21) refers to questions which inquire as to the dates and prices of Dahl's own purchases of B. M. T. shares.

Under the authority of the leading case of Re Barnes, 204 N. Y. 108, 97 N. E. 508, the declinations of Dahl to answer the foregoing questions were founded in reasonable cause and legal excuse, and cannot constitute the basis of an order of commitment.

The facts of the Barnes Case, briefly stated, were these: The state legislature in the year 1911 adopted a concurrent resolution of the New York senate and assembly authorizing the appointment of a special committee of the legislature with power to investigate charges of alleged misfeasance, dishonesty, extravagance, and corruption in connection with the city and county administrations of Albany, New York, and to report back to the

senate with its recommendations. The resolution authorized and empowered the committee "to subpœna and compel attendance of witnesses, including public officers and employees, and the production of books and papers, including public records and documents, to administer oaths, take proof and testimony," etc. The committee subpœnaed Mr. Barnes, at that time a powerful Republican leader in Albany. He was shown to be a stockholder in the J. B. Lyon Company, a printing corporation having relations with certain public officials in Albany. Barnes admitted the number of shares which he held, but refused to state when he acquired the stock, or how much he paid for the stock, or whether he paid anything for it. Thereupon Barnes was cited for contempt. The Court of Appeals held that the questions which the witness declined to answer were not legal or pertinent, and that, therefore, he was not required to answer them.

Judge Gray in his opinion (204 N. Y. 118, 97 N. E. 511), states the rule as follows:

"The five questions, which the witness refused to answer, and which are now involved are these: '(1) Mr. Barnes, you got your stock (referring to the stock of the Lyon Company), in 1901, is not that true? (2) Did you pay anything for your stock in the Lyon Company? (3) Did you talk to Mr. Lyon about the consideration that you paid for your stock at the time that you saw him? (4) Did you pay anything for it? (5) Was it given to you?' The J. B. Lyon Company was a corporation, which had furnished the county of Albany with printing for a period of ten years, and Barnes was the owner of 750 out of an issue of 3,000 shares of capital stock. He testified to having been a 'leader' of the Republican party, a party for some years dominant, politically, in Albany county; employing that term, as he said, to mean 'a man whose advice is taken largely by the men of the political party, with whom he is associated.' As stated by Justice Kellogg, at the Special Term, 'the investigation was being had as to whether a person in that position had acquired a substantial stockholding interest in a company, which furnished printing to a large amount to the political subdivision in which he was a figure of power, without any adequate compensation therefor, and whether this species of patronage had been given to the

company in return for an ownership or interest.' . . . The fact of his interest in a company, which was contracting and dealing profitably with the municipal departments and public officials, was made known, and the committee could make such inference, and deduce such conclusions therefrom for its report, as its members might deem to be justified. The committee could not be aided, within the proper legislative province of its inquiry, by the knowledge of how Barnes had obtained his stock. *He owned it, and the time when he got it, or the consideration for it, were matters quite immaterial and beyond the jurisdiction of the committee to inquire into.*" (Italics mine.)

In the instant case, to paraphrase the language of Judge Gray, Dahl admitted both the ownership of stock in the I. R. T. and B. M. T. and the amount thereof, "and the time when he got it, or the consideration for it, were matters quite immaterial" and beyond the jurisdiction of the Commission "to inquire into." In the present case, as in the Barnes Case, *supra,* the fact of the actual ownership of the shares of stock of the two corporations in question has been disclosed. Here, as in the Barnes Case, *supra,* it is sought to inquire as to when and on what terms and for what consideration the shares were acquired. This, under the controlling authority of the Barnes decision, may not be done, nor can such information in any conceivable way be regarded as aiding the Transit Commission in its task of preparing a plan of readjustment as directed by article 6, § 106, of the P. S. C. Law. It is difficult to conceive of a precedent which could be more directly in point and, in principle and in doctrine enunciated, more controlling upon this court.

[7] The learned counsel for the Transit Commission argued that every case "stands upon its own facts," and denied that there is any such thing as "a precedent as to what is material and pertinent," and, in fact, that the Barnes Case, *supra,* may be disregarded. While recognizing that the law is not a "mere game" (Ehrlich, Die Juristische Lagik, p. 295), and that the attainment of substantial justice is fully as important as a too slavish and meticulous adherence to outworn precedents, nevertheless, as well said by Chief Judge Cardozo, "adherence to

precedent should be the rule and not the exception" (Cardozo, The Nature of the Judicial Process, p. 149).

The labor of the courts, indeed, would be immeasurably increased and magnified if past decisions constituted no safe guide, and if "one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." Cardozo, op. cit. p. 149.

While it is a fallacy to conceive that precedents constitute the only dynamic force at work in the development of our legal system, at the same time it must be conceded that "the law is a logical development, like everything else" (Holmes, Collected Legal Papers, p. 180), and the axioms of judicial pronouncements may not be lightly flung aside, and assuredly not by a tribunal for hearings at *nisi prius*. See, too, Kent Commentaries on Amer. Law, vol. 1, p. 476.

It is also urged upon the court's attention that two judges of the court of appeals dissented from the decision in the Barnes Case, *supra,* and "wrote a very emphatic opinion to the effect that the questions asked Mr. Barnes were both material and pertinent." But this court, irrespective of what its personal views may be, if indeed it were seemly to express these, is bound to follow the authority of the Barnes Case, *supra,* for, if the dissenting judges therein thought that the questions asked were legal and pertinent, is it not transparently obvious that the majority of the court held and authoritatively adjudged the precise contrary, deciding that the questions were not material, pertinent, or legal?

The court at *nisi prius* is not at liberty to disregard the ruling of the five judges constituting a majority of the court of appeals and adopt the view of two dissenting judges.

Moreover, the Barnes Case, *supra,* has never been limited or questioned. It has been repeatedly cited and followed, as, for example, in Hirshfield v. Hanley, 228 N. Y. 346, 349, 127 N. E. 252, where the unanmious court of appeals, citing the Barnes decision, *supra,* declared that:

"The courts should and will be quick and firm in halting the exercise of those powers for irrelevant, illegitimate, or oppressive examinations or purposes."

See, also, Public Service Commission v. Mendel, 162 App.

Div. 371, 376, 147 N. Y. Supp. 603; People v. Foster, 204 App. Div. 295, 198 N. Y. Supp. 7, affirmed 236 N. Y. 610, 142 N. E. 304; Re Foster, 139 App. Div. 769, 777, 124 N. Y. Supp. 667, 675; Re Nicosia, 180 App. Div. 427, 429, 167 N. Y. Supp. 912; People ex rel. Sabold v. Webb, 5 N. Y. Supp. 855, 859.

The Supreme Court of the United States has also passed upon this subject in the case of Harriman v. Interstate Commerce Commission, 211 U. S. 407, 53 L. ed. 253, 29 Sup. Ct. Rep. 115. In that case the Interstate Commerce Commission undertook, pursuant to § 12 of the Interstate Commerce Act (24 Stat. 379), to exercise its power to keep itself informed with respect to the management of common carriers and to obtain from them the complete information necessary to enable the performance of the duties imposed by law upon the Commission. For that purpose the Commission instituted a general investigation concerning combinations of common carriers, the relations existing between them, their practices and methods, etc., in order to discover any possible violations of the statute. Mr. Harriman was called as a witness by the Commission under an order made by it in this investigation. He was then president and chairman of the executive committee of the Union Pacific Railroad Company, as well as a director of the railroad. The Commission was investigating the relations of that railroad with other roads, both parallel and connecting. He was asked such questions as when he acquired certain stock in certain railroads, what he paid for such stock, whether it was acquired by a pool, and the like. The Commission insisted that this information might aid it in recommending additional legislation to Congress. The witness refused to answer all questions of this nature, and the Supreme Court of the United States in all respects sustained his refusals to answer. Mr. Justice Holmes at page 417 of 211 U. S. (29 Sup. Ct. Rep. 117) stated as follows:

"And the result of the arguments is that whatever might influence the mind of the Commission in its recommendations is a subject upon which it may summon witnesses before it and require them to disclose any facts, no matter how private, no matter what their tendency to disgrace the person whose attendance has been compelled. If we qualify the statement and say

only legitimately influence the mind of the Commission in the opinion of the court called in aid, still it will be seen that the power, if it exists, is unparalleled in its vague extent."

See, also, Federal Trade Commission v. American Tobacco Co. 264 U. S. 298, 68 L. ed. 696, 44 Sup. Ct. Rep. 336, 32 A.L.R. 786; Ellis v. Interstate Commerce Commission, 237 U. S. 434, 59 L. ed. 1036, 35 Sup. Ct. Rep. 645.

The foregoing cases are authorities controlling upon this court, and which it is not at liberty to disregard.

[8] Furthermore, the burden of proof is plainly upon the Transit Commission to establish the materiality of the testimony sought to be elicited by the interrogatories.

In People v. Foster, *supra*, the court of appeals in affirming an order of the appellate division, first department, setting aside a conviction of criminal contempt based upon Foster's refusal to answer questions asked him by the Lockwood Committee, stated as follows:

"Order affirmed on ground that the people did not discharge burden of proving that reports which defendant refused to produce were material."

[9] It is also urged that these questions are material and proper because of the alleged duty of the Transit Commission to inquire into the "character" and "integrity" of the management of the B. M. T. in order to determine the nature of management and control which it will recommend in its proposed plan of readjustment. Upon this theory there is no limit beyond which the examination might not proceed. It would justify an examination of the witness as to any and all transactions of his past life. A man's character and integrity are not proper subjects for such investigation by an administrative body of the nature of the Transit Commission. Nor may the Commission conduct an inquisition into Dahl's personal stock dealings in order to unearth alleged iniquities as a means for controlling the future conduct of others. If Dahl had been guilty of any misbehavior, and if he has in any respect betrayed the interests of those who trusted him, those are proper matters to be considered in a possible stockholder's action (Continental Securities Co. v. Belmont, 206 N. Y. 7, 99 N. E. 138, 51 L.R.A.(N.S.) 112,

Ann. Cas. 1914A, 777), or by the officials intrusted with the administration of the criminal law; but they are not involved or comprehended within article 6 of the P. S. C. Law, no matter how liberally construed.

The eminent special counsel for the Transit Commission deserves commendation for his worthy efforts to expose that which he considers to be reprehensible misconduct, but the proper forum is either the equity courts in a stockholder's action, the criminal courts in a prosecution by the people of the state, or possibly the state legislature, which may desire to investigate and to enact legislation to meet the abuses which it is claimed now exist. It may well be that in a proceeding of one of the natures above indicated the materiality of the questions propounded to the witness might not well be denied. It may further well be that a statute might properly be enacted in order to forbid the irregularities and derelictions of duty of which counsel complains. But the propounding of questions which have not been affirmatively established to possess a material, relevant, and legal bearing upon the purposes of the present transit hearing and investigation is not here warranted. Every argument applicable to the questions condemned by the court of appeals in the Barnes Case, *supra,* applies with equal force to the questions propounded to Dahl concerning his personal stock acquisitions in shares of the B. M. T. or the I. R. T., respectively, in the instant case. See, also, In Re Pacific Railway Commission (C. C.) 32 Fed. 241, 263; Federal Trade Commission v. American Tobacco Co. *supra,* at p. 305 of 264 U. S. per Holmes, J.

The foregoing discussion disposes of the second group of questions comprising Gilchrist headings (5), (19), and (21), which, for the reasons above stated, need not be answered by the witness.

Group 5, comprising Gilchrist heading (13), may be very briefly disposed of. It consists of questions as to money borrowed by the B. M. T. for the purchase of stock in the I. R. T. Thus, the witness declined to answer whether the money for this purchase was borrowed by the B. M. T. from the Chase National Bank, and at what time, and in what amount. These questions are immaterial for the purpose of the present investigation. It was admitted that the money was borrowed from the Chase Na-

tional Bank, and the witness stated, as appears from the statement of facts in this opinion, that the B. M. T. has $3,200,000 of loans outstanding in the Chase Bank, and that one of these loans was in the sum of about $900,000 on or about May 10, 1927. The necessary facts all appear. The questions which the witness refused to answer are of no consequence. For every purpose of this investigation, everything essential appears in the record. The court does not overlook the fact that Wiggin is chairman of the board of the Chase National Bank and at the same time chairman of the finance committee of the B. M. T. Nor does the court overlook the fact that Dahl is a former vice president of the Chase National Bank and now chairman of the board of the B. M. T., and formerly a partner in the stock brokerage firm of Hayden, Stone & Company, from which firm the stock was taken up on May 10, 1927. It may be that such practice of borrowing in this manner is the subject of legitimate criticism. Possibly legislation should provide against the situation which the zealous special counsel had in mind, but the propriety or impropriety of these practices, their justification or lack of it, are not material in the present investigation.

For these reasons, therefore, the questions under Gilchrist heading (13), under group 5, need not be answered.

The questions in group 3 comprise Gilchrist headings (9), (12), (14), and (17), and relate to when the B. M. T. purchased its holdings of I. R. T. stock, the dates and amounts of specific purchases making up its present holding, and how much I. R. T. stock the B. M. T. has owned prior to the present date, and more specifically within ninety days prior to the date of the commencement of the investigation.

The questions under Gilchrist heading (9) are immaterial, under the controlling authority of Re Barnes, *supra*. They relate to when the order was given and under said decision are neither relevant nor pertinent, and have nothing properly to do with this inquiry. Nor was any foundation laid to establish the relevancy and materiality under the doctrine of People v. Foster, *supra*.

The questions under Gilchrist heading (17) are improper and immaterial, for the same reasons. They relate to how long the

brokerage firm of Hayden, Stone & Company had been carrying I. R. T. stock for the B. M. T. Company. These questions are simply an attempt to ascertain by indirection the time of purchase, which is immaterial for reasons already stated, and under the authority of Re Barnes, *supra,* and Harriman v. Interstate Commerce Commission, *supra.*

[10] On the other hand, some of the questions under Gilchrist headings (12) and (14) are material. Under heading (12), Dahl declined to answer questions as to whether the 19,600 shares of I. R. T. stock, which were conceded to be owned by the B. M. T. at the time of his testimony, were *all* which the B. M. T. purchased within three months preceding that date, and whether the B. M. T. had made sales and purchases of said stock within that period. Under heading (14), Dahl refused to answer questions as to how much I. R. T. stock the B. M. T. has owned at any one time within that period. As the two chief factors represented by transit lines that would feature the proposed plan are the I. R. T. and (through its subsidiary, the New York Rapid Transit Corporation) the B. M. T., which the witness conceded to be competing companies, the materiality of the extent of the holdings by B. M. T. of I. R. T. stock purchased, partially at least, for the purpose of obstructing the dealings between the city and the I. R. T., becomes evident. The facts as to said holdings are shrouded in doubt, and the witness should also answer the questions as to the amount owned by the B. M. T. within the 90-day period referred to. The facts as to stockholding of the B. M. T. in the I. R. T., a public service corporation admittedly subject to the jurisdiction of the commission and directly involved in the present investigation, are material. So also, under the circumstances shown by the record and hereinbefore set forth, as to the amount of said stock owned by the B. M. T. within a comparatively recent period of time. In fact, the B. M. T. may own in excess of the amount of I. R. T. holdings which Marston admits. The picture as to stockholders should be complete. The ownership of the stock of the I. R. T. should be disclosed to the Commission in connection with the preparation of a plan of readjustment. The Barnes Case, *supra,* decides nothing to the contrary. Wiggin, Dahl, and Chadbourne

presented written statements setting forth how much stock they owned in the I. R. T. They admitted both the fact and the amount. They refused to answer *when* they got that stock, and, under the Barnes Case, *supra*, they were justified in that refusal. But, with regard to the B. M. T., the situation is quite different. The B. M. T. has never made full and frank disclosure of its stock ownership in the I. R. T., either at the time of the refusals to answer on the witness' part, or within a reasonable time preceding the investigation. It is true that Marston, a secretary, testified that the B. M. T. owns 19,650 shares of I. R. T., but Dahl said he was "quite certain" 19,600 shares was the amount. But Marston stated there were no written entries of the transactions. He produced no books. He gave no certified list. In view of this, the refusals by Dahl (at whose direction the purchases were made) to further answer seem significant. Dahl would not say *anything* with reference to the acquisitions by the B. M. T. of I. R. T. stock. Though Dahl may not be required to state when it was acquired or at what prices (Barnes Case, *supra*), he must testify *how much stock* the B. M. T. owned in the I. R. T. at the date of his testifying and for a reasonable period before. The Transit Commission is entitled to know who the stockholders in the I. R. T. really are and the amount of their stockholdings. P. S. C. Law, §§ 5, 5-a, 45, 106. The I. R. T. is a public service corporation, and all stockholders therein must give full and frank information as to their holdings. The Commission is not bound to accept the testimony of Marston, which was uncertain on this point. It is entitled to have the sworn statements on this subject of the witness Dahl, who is no mere secretary, but the chairman of the B. M. T. board and its "guiding genius."

[11] Counsel for the Commission, in urging the materiality of these questions, lays stress upon § 54 of the P. S. C. Law, which limits the amount of stock which a stock corporation may acquire in a railroad corporation to 10 per cent P. S. C. Law, § 54, subd. 2. The answer to this contention is that the P. S. C. Law nowhere confers upon the Transit Commission any power to enforce the prohibition contained in this section. Whether there has been a violation would seem to be within the province

of the Attorney General of the state. Certainly, whether there has been a breach of the prohibition in this section is not a matter involved in the present investigation. See People ex rel. New York, N. H. & H. R. Co. v. Willcox, 200 N. Y. 423, 431, 94 N. E. 212; People ex rel. New York R. Co. v. Public Service Commission, 223 N. Y. 373, 379, P.U.R.1918F, 125, 119 N. E. 848; People ex rel. Delaware & H. Co. v. Stevens, 134 App. Div. 99, 118 N. Y. Supp. 969, affirmed 197 N. Y. 1, 90 N. E. 60. Moreover, the Commission was not and is not purporting to conduct the present investigation in order to determine whether § 54 has or has not been violated. The sole purpose of this proceeding is to acquire information and material necessary for the preparation of a readjustment plan. Furthermore, the penalty provided for a violation of § 54 would seem to be prescribed and outlined in the statute itself, to wit, the transaction as a matter of law is a nullity, void, and legally nonexistent.

Nor does the court regard these questions as material because they may tend to shed light on an alleged enrichment of the officers of the company at the expense of the stockholders and of the public. For reasons above set forth, this is not the time or place, nor the correct form of proceeding, in which such matters may be inquired into.

The questions under headings (12) and (14) are material, nevertheless, for the reasons hereinbefore stated.

This discussion disposes, therefore, of group 3. Summarizing, the questions in said group under Gilchrist headings (9) and (17) have been shown to be immaterial, and need not be answered; whereas, with regard to the questions under Gilchrist headings (12) and (14), the questions therein involved which relate to the amount of the holdings of the B. M. T. in the I. R. T., both at the time of the witness' refusal to answer and for the period preceding, are material, and, therefore, must be answered.

The questions under group 4 relate to antecedent buying and selling in the market of B. M. T. or I. R. T. stock on the part of Dahl or the B. M. T. or others. This group comprises Gilchrist headings (6), (11), (15), (16), and (20). Of these headings the questions under headings (6), (16), and (20) have not been shown pertinent and material. Heading (6) relates to

questions whether Dahl was buying and selling in the stock market, and more particularly whether he was trading in and out of the market in B. M. T. and I. R. T. stock during the last six months. These interrogatories are not material for the reasons above outlined and under the controlling decisions herein referred to. Counsel for the witness argues that these questions constitute "an effort to pry into his personal and private business." With this contention the court does not agree. Whether affairs are "personal and private" is not the test. The true criterion determining whether the witness must answer is whether the questions are material and pertinent. As, under the authorities, they are neither of these, the witness should not be required to answer.

Under Gilchrist headings (16) and (20) Dahl refused to answer questions whether he, Chadbourne, and Wiggin were trading in and out of the stock market in I. R. T. stock within the ninety days preceding the date of giving the testimony, and whether he personally had been in the stock market during the preceding day or two. For reasons already stated, these inquiries are not material, and, therefore, need not be answered.

On the other hand, the questions under Gilchrist heading (11), as to whether or not the witness was selling I. R. T. stock for the B. M. T. within ninety days preceding his testimony, are held to be material for reasons already stated as to questions within headings (12) and (14). The very first question under Gilchrist heading (11) would not seem, however, to be material, and must be differentiated and excepted from the other questions under this heading. It reads as follows: "Were *you* selling?" and apparently relates solely to Dahl's individual sales as distinguished from his sales on behalf of the B. M. T., to which the remaining three questions under Gilchrist heading (11) refer.

With regard to Gilchrist heading (15), the same remarks apply. The questions therein refer to Dahl's refusal to answer questions as to how much I. R. T. stock the B. M. T. has sold within the three months preceding the testimony of the witness. The materiality of these questions has already been shown. Though the propriety of the B. M. T. dealing in the stock of the I. R. T., a competing public service company, is not directly

involved in the present inquiry, and from that standpoint these questions are not pertinent, yet, on the other grounds hereinabove stated, they are material and should be answered.

It has been, indeed, a difficult matter to dispose of this motion, predicated upon so voluminous a record, within the limited amount of time available. The court has endeavored to survey the matter patiently and deliberately, yet with as much expedition as the importance and gravity of the proceeding would permit.

For the reasons above stated, the court is constrained to deny the motion as to Gilchrist headings (1), (2), (3), (4), (7), (8), (10), and (18), under group 1, Gilchrist headings (5), (19), and (21), under group 2, Gilchrist headings (9), and (17), under group 3, Gilchrist headings (6), (16), and (20), under group 4, the Gilchrist heading (13), under group 5. As to Gilchrist headings (12) and (14), under group 3, and (11) and (15), under group 4, the court will require all questions therein to be answered (P. S. C. Law, § 19) which bear on the holdings of the B. M. T. in the I. R. T., both at the date of the refusal of the witness to testify thereto and for a period of three months immediately preceding that date. Prices and times of purchase and sale need not be given. (Re Barnes, *supra*), but quantities of purchases and sales, as well as holdings, must be fully and frankly stated. The refusals on the part of Dahl to answer the said questions last referred are held to be without reasonable cause or legal excuse, and accordingly bring the witness within the specific punitive provisions of the P. S. C. Law, § 19, subd. 2, par. 2. Therefore, the court is constrained to hold that the witness Dahl must forthwith give full, complete, and truthful answer to the said questions addressed to him by the Transit Commission of the state of New York through its special counsel, and which he has thus far refused to answer, and that, in the event of refusal, a warrant must issue committing Dahl to jail, to remain there until he shall answer the said questions. Settle order on notice.

NEW YORK SUPREME COURT, SPECIAL TERM, NEW YORK COUNTY.

JOHN F. GILCHRIST et al.

v.

ALBERT H. WIGGIN.

(130 Misc. 491, 224 N. Y. Supp. 249.)

Commissions — Power to inquire into stockholder's affairs — Transit investigation.

A Commission investigating a plan for the readjustment of transit service may not properly ask when a witness bought stock in a transit company and how much he paid for it, such question not being material or pertinent.

[September 15, 1927.]

APPLICATION of Transit Commission for a warrant committing reticent witness to jail; refused.

Appearances: Clarence M. Lewis, of New York city (Samuel Untermyer, Irwin Untermyer, and I. Maurice Wormser, all of New York city, of counsel), for Transit Commission; Rushmore, Bisbee & Stern, of New York city (Nathan L. Miller, Henry Root Stern, H. G. Pickering, and Bertram F. Shipman, all of New York city, of counsel), for Wiggin; William D. Guthrie and Samuel Seabury, both of New York city, *amici curiæ*, for other witnesses.

Frankenthaler, J.: This is a proceeding of a similar nature to that in the matter of Dahl, 130 Misc. 456, P.U.R.1928A, 336, 224 N. Y. Supp. 210, decided herewith. See opinion.

The questions which the witness Wiggin refused to answer are unauthorized and immaterial under the decision in the matter of Barnes, 204 N. Y. 108, 97 N. E. 508. Wiggin stated the number of shares of stock of the Brooklyn-Manhattan Transit Company, hereinafter referred to as the B. M. T., and of the Interborough Rapid Transit Company, hereinafter referred to as the I. R. T., respectively, which he owned. Thus, as to I. R. T. stock, he replied that he owned 3,600 shares. He declined to answer when he bought these. Under the decision in the Barnes Case, *supra*, he was correct in declining to answer that question.

He was also asked what he paid for his stock in the I. R. T., and whether he bought his I. R. T. stock before or after the

B. M. T. bought its I. R. T. stock, and whether he bought his stock at lower prices than the B. M. T. bought its I. R. T. stock. The declinations to answer these questions were well founded. Harriman v. Interstate Commerce Commission, 211 U. S. 407, 53 L. ed. 253, 29 Sup. Ct. Rep. 115; People v. Foster, 236 N. Y. 610, 142 N. E. 304; Matter of Barnes, *supra*.

The witness Wiggin further testified that he was a very large holder of B. M. T. stock, and that his holdings amounted to 38,500 shares of common and 20,003 shares of preferred. He refused, however, to state whether he got that stock at the time of the reorganization of the B. M. T. The witness said: "I decline to answer the questions as to when I purchased and the prices I paid." In this declination the witness was within his legal rights under the authority of the cases above cited. The testimony sought to be elicited was neither material nor pertinent for purposes of the present investigation. So also the witness was justified in refusing to answer whether or not he held his stock in July, 1926, when the I. R. T. strike occurred; this being an attempt to ascertain by indirection the same fact, which for reasons heretofore stated is immaterial and irrelevant for the purposes of the present investigation.

These are the only questions which the witness Wiggin declined to answer. There were no refusals to answer on his part with reference to acquisitions by the B. M. T. in the I. R. T. as in the case of his fellow witness Dahl.

For the foregoing reasons, the court denies the motion in all respects as to the witness Albert H. Wiggin. Settle order on notice.

UNITED STATES SUPREME COURT.

CITY OF HAMMOND

v.

FARINA BUS LINE & TRANSPORTATION COMPANY.

[No. 68.]

(— U. S. —, 72 L. ed. —, 48 Sup. Ct. Rep. 70.)

Appeal and review — Scope of review — Questions open upon appeal.

1. The issues of fact or law vital to the determination of an appealed cause should be settled by a lower court, upon the evidence introduced, before the submission to a higher tribunal, p. 383.

P.U.R.1928A.

Injunction — Final adjudication by agreement — Federal procedure.

2. If by agreement of the interested parties an application for an interlocutory injunction restraining the operation of a municipal ordinance is submitted for final judicial determination on the merits of the whole cause, and the bill is thereupon dismissed, the Supreme Court, in requiring further hearing upon the evidence will affirm a decree of the Circuit Court of Appeals reversing such dismissal, modifying it to permit a temporary injunction to operate pending the outcome of the proceeding, p. 383.

[November 21, 1927.]

APPEAL to the United States Supreme Court from the decree of the Court of Appeals for the Seventh Circuit reversing the dismissal by the District Court of an application by a motor utility for an interlocutory injunction restraining the operation of a municipal ordinance; decree modified and cause demanded to the District Court for further proceedings. See same case below, 11 F. (2d) 943.

Appearances: Louis T. Michener, C. B. Tinkham, and Gerald Gillett, for petitioner; Jesse J. Ricks, Edmond W. Hebel, and Frederick C. Crumpacker, for respondent.

Mr. Justice **Brandeis** delivered the opinion of the Court.

[**1, 2**] This suit was commenced in the Federal Court for Indiana in June, 1925; and is here on certiorari to the Circuit Court of Appeals. 273 U. S. 675, 71 L. ed. 834, 47 Sup. Ct. Rep. 92. As in Hammond v. Schappi Bus Line, decided this day, — U. S. —, 72 L. ed. —, P.U.R.1928A, —, 48 Sup. Ct. Rep. —, the plaintiff, Farina Bus Line and Transportation Company, is an Illinois corporation; the defendant is the city of Hammond; the relief sought is an injunction to prevent the enforcement of ordinance No. 1945, adopted May 23, 1925; and the relief was denied by the District Court without finding any facts and without opinion. The Circuit Court of Appeals reversed the decree and remanded the case with directions "to enter a decree granting the injunction." The decision was rendered on the same day on which that court rendered its decision in the Schappi case, *supra*. It, also, made no finding of facts. It filed no opinion and gave no reasons for its action save the statement that "the discussion there applies equally to this case."

The Farina Company operates a route from several small cities in Illinois through the town of Munster, Indiana, to its

terminal in the business district of Hammond. There, its busses connect with an allied street railway, which extends from Hammond into the city of Gary, Indiana; and through passengers from the Illinois cities to Gary pass over this route. A small percentage of the business is intercity traffic between Munster and Hammond; and, hence, intrastate. The Farina Company holds a certificate of public convenience and necessity issued by the Public Service Commission of Indiana under the Acts of 1925 for all its routes. The Farina Company alleges that the ordinance, if enforced, will necessitate abandonment, not only of the existing routes, but of its business. The evidence, consisting mainly of affidavits, is conflicting.

The contentions, the issues of fact and of law, and the character of the evidence introduced, are largely similar to those in the Schappi case, *supra*. But there are differences which may be important. The Calumet Company does not serve Munster or the small Illinois cities, so that it is not a direct competitor of the plaintiff. None of the busses carry local passengers within the city of Hammond. There is also a difference in the stage of the proceedings at which this case came before the Court of Appeals. It was heard on appeal from the final decree. An application for an interlocutory injunction had been made; but the cause was later submitted ot the District Court by agreement of the parties, as upon final hearing, and the bill was dismissed.

The considerations which led this Court to remand the Schappi case, *supra*, to the District Court for further proceedings on final hearing are applicable in the main also to this case. We think that it should be heard by the District Court anew upon final hearing upon evidence to be adduced. To this end, the decree entered in the Court of Appeals is affirmed in so far as it reversed the decree dismissing the bill. In so far as it directs that an injunction issue, it is modified to the extent of directing an injunction pending the suit instead of a permanent injunction, the propriety of the latter being reserved until the final hearing. The cause is remanded to the District Court for further proceedings on final hearing, that court to have liberty, among other things, to allow amendment of the pleadings. Costs in this Court are not allowed to either party.

P.U.R.1928A.

CALIFORNIA RAILROAD COMMISSION.

CALIFORNIA TRANSIT COMPANY

v.

M. L. SCOTT AND D. SCOTT, doing business as Big Three Employment Office et al.

[Decision No. 18686, Case No. 2178.]

Public utilities — Test of status — Employment agency — Automobiles.

An employment agency operating automobiles to transport laborers between fixed termini for compensation received from the companies thus accommodated is a public carrier subject to Commission regulation.

[August 5, 1927.]

COMPLAINT against alleged illegal operation of auto stages for hire; defendants ordered to cease operations.

Appearances: Earl A. Bagby and L. J. Smallpage, for complainant; Thelen and Marrin, by Paul Marrin, for defendants.

By the **Commission**: California Transit Company, a corporation, engaged in the operation of automobile stage lines as a common carrier, for compensation, herein complains of M. L. Scott, D. Scott, M. L. Scott, and D. Scott, doing business under the fictitious name of Big Three Employment Office, and A. C. Sadler, alleging:

1. That defendants, and each of them, are engaged in the business of transporting passengers for compensation as common carriers thereof, and between fixed termini, and over regular routes, within the state of California and over the public highways thereof, without first having obtained from the Railroad Commission a certificate declaring that public convenience and necessity require such operation, or any other certificate, order or permit so to do.

(2) That neither of said defendants nor any of their predecessors in interest, were actually operating in good faith, or at all, in the transportation of passengers over the public highways of this state between fixed termini or over regular routes, or at all prior to or during the year 1917 and that all the opera-

tion herein complained of is contrary to and in violation of the provisions of Chap. 213, Statutes of 1917, and effective amendments thereto.

(3) That the regular routes and fixed termini over which said defendants have been and are transporting passengers for compensation are between Stockton and Merced Falls, via French Camp, Escalon, Oakdale and Waterford; between Stockton and Fresno, via main state highway; and between Stockton and all points in the state of California for which passengers can be secured.

(4) That defendants and each of them, in carrying passengers as hereinabove alleged, also carry passengers to and from points intermediate to the termini hereinabove mentioned.

(5) That defendants and each of them in the operation hereinabove alleged, are operating jointly, each with the other, and with full knowledge and in defiance of the statutory law.

(6) That complainant is lawfully operating in the transportation of persons between Stockton and Manteca via French Camp and to all points intermediate thereto and to many other points in the state of California; and that the alleged unlawful operation of defendants is doing great and irreparable injury to the business of complainant and is detrimental to the public service offered and furnished by said complainant.

Complainant prays for an order requiring defendants and each of them, to cease all transportation of passengers for compensation and from operating either as a common carrier of passengers or as a carrier of passengers between fixed termini or over regular routes within the state of California, and in particular between the termini or over the routes hereinbefore specified; for the enforcement of said order; and for such other and further relief as to the Commission may appear meet and proper in the premises.

Defendants duly filed their answer to the complaint, said answer being a general denial of the material allegations contained in the complaint.

A public hearing on this complaint was conducted by examiner Handford at Stockton, evidence was received and the matter was duly submitted.

M. L. Scott testified that he resided in Stockton and with D. Scott conducted an employment agency maintaining offices in Stockton and Sacramento under the fictitious name of Big Three Employment Agency; the defendant A. C. Sadler was an employee; and that in the conduct of his business applicants for employment were transported to the location of the employment by the cars of witness, compensation being received from the company for whom the employee was secured. In the transportation incidental to the business of witness between Stockton and Merced Falls, no regular route was followed, there being a variety of routes and the one meeting the immediate convenience of witness at a particular time being the one selected for travel. The witness stated that no transportation had been furnished to anyone unless employment had been secured for them through defendants' labor agency; that no transportation service had been furnished to Standard or Tuolumne since the granting of an injunction by the superior court of San Joaquin county, although trips were being made between Stockton and Merced Falls and Central Camp, not upon any regular schedule but as were occasioned by labor movement as employed through his labor agency.

A. C. Sadler testified that he was an employee of M. L. Scott and had been for four months, the nature of his employment being as a driver; and that four cars, each of eight-passenger capacity, were owned by Scott and used in the transportation of laborers who had secured their work through the employment agency. Witness had transported laborers and others who had secured employment through the agency from Stockton to the points of employment at Sugar Pine, at Merced Falls, and at Central Camp. But two trips to Sugar Pine had been made during the preceding four months, although trips to Merced Falls were made frequently averaging from four to six times per week. On return trips some passengers were hauled from Merced Falls into Stockton although no regular amount was collected, payment varying from 50 cents to $3 having been made.

After full consideration of the record herein we hereby conclude and find as a fact that the operation of automobiles in the carriage of passengers for compensation between Stockton and Merced Falls and intermediate points by defendants M. L. Scott,

D. Scott, and M. L. Scott and D. Scott doing business as Scott Brothers or Big Three Employment Agency is in violation of the provisions of Chap. 213, Statutes of 1917, and effective amendments thereto, in that such operation has been conducted between fixed termini, for compensation, and without authority therefor having been obtained from this Commission by a certificate of public convenience and necessity as required by the aforesaid statutory enactment.

It appearing from the record that A. C. Sadler, defendant herein, was not a participant in the operation herein found to be in violation of the statute other than as an employee of the other defendants herein, the complaint as to such defendant will be dismissed.

UNITED STATES SUPREME COURT.

CITY OF HAMMOND

v.

SCHAPPI BUS LINE, INCORPORATED.

[No. 67.]

(— U. S. —, 72 L. ed. —, 48 Sup. Ct. Rep. —.)

Constitutional law — When constitutional questions are to be decided — Ordinances.

1. There is no occasion for a Federal Court to consider whether an ordinance violates the Federal Constitution if it is void under the state law, p. 392.

Appeal and review — Scope of review — Record of proceedings in lower court — State law.

2. Whether a municipal ordinance is void under the law of the state involves questions upon which the Supreme Court of the United States should not be called upon to pass without the aid which discussion by members of the lower courts familiar with the local law should afford, p. 392.

Appeal and review — Scope of review — Questions open upon appeal.

3. The facts essential to the decision of any question vital to the determination of an appealed cause should be definitely found by lower courts upon adequate evidence before such a question is passed upon by the Supreme Court of the United States, p. 394.

Appeal and review — Scope of review — Questions open upon appeal — Final determination.

4. An appeal from an interlocutory decree denying a preliminary injunction to restrain the operation of an ordinance is not a submission of a cause for final judicial determination, and a ruling made on the basis of evidence presented at such a hearing can be rendered of no avail by the presentation of additional evidence when the case comes up upon final hearing, p. 395.

[November 21, 1927.]

APPEAL to the United States Supreme Court from a decree of the Circuit Court of Appeals reversing the decision of the District Court denying a petition for an injunction by motor utility to restrain the operation of a municipal ordinance; decree modified and cause remanded to District Court for further proceedings. See same case below, 11 F. (2d) 940.

Appearances: C. B. Tinkham, Louis T. Michener, and Gerald Gillett for petitioner; William J. Whinery for respondent.

Mr. Justice **Brandeis** delivered the opinion of the court: This suit, which was commenced in the Federal Court for Indiana in July, 1925, is here on certiorari to the circuit court of appeals. 273 U. S. 675, 71 L. ed. 834, 47 Sup. Ct. Rep. 92. Schappi Bus Line, Incorporated, an Illinois corporation, seeks to enjoin the city of Hammond, Indiana, from enforcing its ordinance No. 1945 concerning the operation of motor busses, adopted May 23, 1925.[1] Section 1 prohibits the operation of any

[1] No. 1945.

An ordinance Regulating and Routing Certain Vehicles for Hire and Prohibiting Their Use of Certain Streets Within the City of Hammond.

Section 1. Be it ordained by the common council of the city of Hammond, Indiana, that in order to promote public safety and order and to diminish the congestion of vehicular travel within said city, from and after the taking effect of this ordinance, it shall be unlawful for any person, firm, or corporation owning or operating any motor vehicle engaged in transporting passengers for hire, to move or run such vehicle on, upon, or over any of the following parts of streets within said city of Hammond, to-wit:—

On Hohman street from Russell street to Michigan avenue;

On State street from Morton court to Calumet avenue;

On Sibley street from the easterly line of the right-of-way of the Chicago, Indianapolis & Louisville Railway Company where the same crosses Sibley street westerly to Morton court;

On Fayette street from Hohman street to Oakley avenue.

P.U.R.1928A.

busses (with an exception to be noted) on certain streets which lead into and through the business district. Section 2 prohibits any busses (with the same exception) from stopping anywhere on any street in the city, either to load or to discharge passengers, but reserves to the board of public works authority to grant, from time to time, permission, for periods not exceeding six months, to stop on portions of a few designated streets.

For some time prior to the adoption of the ordinance, Schappi, Incorporated, had owned and operated a line of motor busses between Chicago and Hammond; another between Calumet city, Illinois, and Hammond; and one from Calumet city through Hammond to East Chicago, Indiana. The business is chiefly interstate; and on at least one of the lines is wholly interstate. The bill charges that for reasons there set forth the ordinance

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Section 2. From and after the taking effect of this ordinance, it shall be unlawful for any person, firm, or corporation, owning or operating any motor vehicle carrying passengers for hire, to stop such vehicle for the purpose of receiving or discharging passengers upon any street, alley, or other public place within said city; provided, that the board of public works may, for any period not exceeding six months or successions thereof, permit such operation on any or all of the following designated parts of streets: Columbia avenue between the South city limits and the right-of-way of the Michigan Central Railroad where the same crosses said Columbia avenue; Sibley street from Columbia avenue to the easterly line of the right-of-way of the Chicago, Indianapolis & Louisville Railway Company; State Line street from its southerly terminus to its northerly terminus at or near the right-of-way of said Michigan Central Railroad aforesaid; Rimbach avenue from State Line street to Ann street; Ann street from Rimbach avenue to Russell street; Russell street from Ann street to State Line street, and for vehicles engaged strictly in interstate commerce any street or other public place north of 122nd street and east of Calumet avenue.

Section 3. Whoever violates any of the provisions of §§ 1 and 2 of this ordinance shall, upon conviction, be fined in any sum not exceeding fifty dollars for each and every offense, but nothing in this ordinance shall be construed to impair the obligation of any contract to which the city is a party under which such motor vehicles are now operated for hire within said city. Nothing herein shall apply to taxicabs.

Section 4. This ordinance shall supplement such ordinances as are now in force, and repeal only so much of them or any part thereof as may be in direct conflict herewith.

Geo. J. Wolf,
President.

Attest:
Arnold H. Kunert,
City Clerk.
P.U.R.1928A.

is void; and alleges that, if enforced, it will compel abandonment of all existing bus lines operated by the plaintiff. The case was heard upon an application for an interlocutory injunction. The district court denied it without making any finding of fact and without an opinion or other statement of the reasons for its action. The decree was reversed by the court of appeals, which remanded the case "with directions to enter a decree granting the injunction," without specifying its scope. 11 F. (2d) 940. That court, also, made no finding on any controverted fact, save that it stated in its opinion "that the record does not show any valid reason for the passage of such an ordinance because of congestion in the streets. The record shows that there was a parking privilege on both sides of the streets in question of not less than an hour's limit, very generally availed of."

The city of Hammond has an area of about thirty-five square miles; much of it sparsely settled. It has 250 miles of streets. Its population is 60,000. The terminal of the three Schappi lines is on private property in the heart of the business district. Schappi claims that the ordinance not only denies access to its existing terminal, but practically prevents its busses from coming within miles of the business section. The city concedes that the ordinance prohibits the continued operation of Schappi busses over their existing routes. It urges that, despite the prohibition of § 1 of the ordinance, Schappi busses might use other streets which would bring them within a short distance of the business district—and that it might, under § 2, secure permits to stop for loading and unloading which would adequately serve its purposes.

The city asserts that the purpose of the ordinance is to prevent congestion of traffic and to promote safety. Schappi insists that there is no congestion, even in the business district, except such as results, at times, from the passing of railroad trains at grade and from the allowance of unreasonable parking privileges; that the prohibition by § 2 of stopping to load or unload passengers is obviously arbitrary; and that the real purpose of the ordinance is disclosed by § 3 which provides that it shall not "be construed to impair the obligation of any contract to which the city is a party under which motor vehicles are now operated for

hire within the city." It appears that, under a contract made by the city in 1924, the Calumet Motor Coach Company is authorized, for a period of twenty-five years, to run its coaches on any street of the city and to stop on any street in order to load or discharge passengers. Schappi asserts that the only purpose of the city in adopting the ordinance was to protect the Calumet Company from the competition of other bus lines. That company has, among other lines, one between Chicago and the business district of Hammond.

The issues of law are as serious and as numerous as those of fact. Schappi contends that the city lacked power to adopt any ordinance dealing with the subject, because by Act of March 4, 1925, Indiana General Assembly, pp. 138–142, and Act of March 14, 1925, Indiana General Assembly, pp. 570–607, the power to authorize use of the highways by motor busses was vested in the Public Service Commission and Schappi had obtained from it certificates of public convenience and necessity specifically authorizing the use of the existing routes. Schappi contends further that, even if the city possessed the power to deal with the general subject, this ordinance is void, under other state statutes and under the Constitution of the state, because it is unreasonable, arbitrary, and grossly discriminatory. And Schappi claims that, regardless of any power which state statutes may have purported to confer upon the city, the ordinance is void under the commerce clause, because all of its busses are operated in interstate commerce and the business is chiefly interstate, although some of the busses carry some intrastate passengers. Rights under the 14th Amendment also were asserted.

[**1, 2**] The opinion of the court of appeals states that the ordinance must be sustained, if at all, as a police regulation; that, as such, it was clearly discriminatory; and that it must be held void on that ground. Whether the invalidity results from the provisions of a state statute, or from the Constitution of the state, or from the 14th Amendment is not stated. The court did not discuss the statutory powers of the city; declined to consider the effect of the recent state legislation particularly relied upon by the plaintiff; and did not even mention claims urged under the commerce clause. If, as Schappi contends, the ordinance is void

under the state law, there is no occasion to consider whether it violates the Federal Constitution and there could be no propriety in doing so. Whether it is void under the law of Indiana involves questions upon which this court should not be called upon to pass without the aid which discussion by members of the lower courts familiar with the local law would afford.

On the other hand, if it should become necessary to consider Schappi's rights under the commerce clause, it is not fitting that these should be passed upon by this court upon the present record and at this stage of the proceedings. The general principles governing the rights of motor vehicles to use the highways in interstate commerce, Michigan Pub. Utilities Commission v. Duke, 266 U. S. 570, 69 L. ed. 445, P.U.R.1925C, 231, 36 A.L.R. 1105, 45 Sup. Ct. Rep. 191; Buck v. Kuykendall, 267 U. S. 307, 69 L. ed. 623, P.U.R.1925C, 483, 38 A.L.R. 286, 45 Sup. Ct. Rep. 324; Bush & Sons Co. v. Maloy, 267 U. S. 317, 69 L. ed. 627, P.U.R.1925C, 488, 45 Sup. Ct. Rep. 326; the power of the state to regulate their use, Kane v. New Jersey, 242 U. S. 160, 61 L. ed. 222, 37 Sup. Ct. Rep. 30; Interstate Busses Corp. v. Holyoke Street R. Co. 273 U. S. 45, 71 L. ed. 530, P.U.R.1927B, 46, 47 Sup. Ct. Rep. 298; Morris v. Duby, 274 U. S. 135, 143, 71 L. ed. 966, 971, 47 Sup. Ct. Rep. 548; and its power to require users to contribute to the cost and upkeep, Hendrick v. Maryland, 235 U. S. 610, 59 L. ed. 385, 35 Sup. Ct. Rep. 140; Clark v. Poor, 274 U. S. 554, 71 L. ed. (Adv. 776), P.U.R.1927D, 346, 47 Sup. Ct. Rep. 702, have been settled by these recent decisions.[2] But the facts here alleged may, if established, require the application of those principles to conditions differing materially from any heretofore passed upon by this court.

The contentions made in the briefs and arguments suggest, among other questions, the following: Where there is congestion of city streets sufficient to justify some limitation of the number

[2] The protection afforded by the 14th Amendment to motor carriers for hire using the highways exclusively in intrastate commerce was considered in Packard v. Banton, 264 U. S. 140, 68 L. ed. 596, 44 Sup. Ct. Rep. 257, and in Frost v. California R. Commission, 271 U. S. 583, 70 L. ed. 1101, P.U.R.1926D, 483, 47 A.L.R. 457, 46 Sup. Ct. Rep. 605. See also Hess v. Pawloski, 274 U. S. 352, 71 L. ed. 1091, 47 Sup. Ct. Rep. 632. P.U.R.1928A.

of motor vehicles to be operated thereon as common carriers, or some prohibition of stops to load or unload passengers, may the limitation or prohibition be applied to some vehicles used wholly or partly in interstate commerce while, at the same time, vehicles of like character, including many that are engaged solely in local, or intrastate, commerce are not subjected thereto? Is the right in the premises to which interstate carriers would otherwise be entitled, affected by the fact that, prior to the establishment of the interstate lines, the city had granted to a local carrier, by contract or franchise, the unlimited right to use all the streets of the city, and that elimination of the interstate vehicles would put an end to the congestion experienced? May the city's right to limit the number of vehicles, and to prohibit stops to load or unload passengers, be exercised in such a way as to allocate streets on which motor traffic is more profitable exclusively to the local lines and to allocate streets on which the traffic is less profitable to the lines engaged wholly, or partly, in interstate commerce? Is limitation of the number of vehicles, or prohibition of stops to load or unload passengers, of carriers engaged wholly, or partly, in interstate commerce, justifiable, where the congestion could be obviated by denying to private carriers existing parking privileges or by curtailing those so enjoyed? Are the rights of the interstate carrier in the premises dependent, in any respect, upon the dates of the establishment of its lines, as compared with the dates of the establishment of the lines of the local carrier?

[3] These questions have not, so far as appears, been considered by either of the lower courts. The facts essential to their determination have not been found by either court. And the evidence in the record is not of such a character that findings could now be made with confidence. The answer denied many of the material allegations of the bill. The evidence consists of the pleadings and affidavits. The pleadings are confusing. The affidavits are silent as to some facts of legal significance; lack definiteness as to some matters; and present serious conflicts on issues of facts that may be decisive. For aught that appears, the lower courts may have differed in their decisions solely because they differed as to conclusions of fact. Before any of the questions suggested, which are both novel and of far-reaching im-

portance, are passed upon by this court, the facts essential to their decision should be definitely found by the lower courts upon adequate evidence.

[4] There is an added reason why this court should not now make the findings of fact or rulings of law involved in these contentions. The court of appeals erred in assuming, as its opinion discloses, that the case had been submitted below as upon final hearing; and that the appeal before it was from a final decree dismissing the bill. The appeal was from the interlocutory decree denying the preliminary injunction; and the record discloses no later proceedings in the district court. The case was not yet ripe for final disposition by the Court of Appeals. Compare Eagle Glass & Mfg. Co. v. Rowe, 245 U. S. 275, 283, 62 L. ed. 286, 290, 38 Sup. Ct. Rep. 80. Findings and rulings if now made on the basis of the evidence presented at the hearing on the application for the temporary injunction, might be rendered of no avail by the presentation of other or additional evidence when the case comes on for final hearing.

Under these circumstances, we deem it proper that, without costs in this court to either party, the decree of the circuit court of appeals be modified by recognizing that the decree in the district court was only interlocutory, by directing an injunction pending the suit, and by remanding the cause to the district court for proceedings on final hearing, with liberty to that court, among other things, to allow amendment of the pleadings.[3]

Decree modified and cause remanded to District Court.

[3] Compare Estho v. Lear, 7 Pet. 130, 8 L. ed. 632; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 179, 44 L. ed. 417, 422, 20 Sup. Ct. Rep. 336; United States v. Rio Grande Dam & Irrig. Co. 184 U. S. 416, 423, 46 L. ed. 619, 622, 22 Sup. Ct. Rep. 428; Lincoln Gas & E. L. Co. v. Lincoln, 223 U. S. 349, 364, 56 L. ed. 456, 472, 32 Sup. Ct. Rep. 271.

OHIO SUPREME COURT.

J. B. LYKINS
v.
PUBLIC UTILITIES COMMISSION OF OHIO.

[No. 20285.]

(— Ohio St. —, 158 N. E. 171.)

Monopoly and competition — Restriction of certificate to protect existing operators — Busses.

A certificate of convenience and necessity is properly granted to operate a motor bus over a route already being covered by the holder of a prior certificate where the Commission has restricted the subsequent applicants from rendering local service within the territory covered by the certificate holder.

[May 11, 1927.]

ERROR to the Public Utilities Commission to review order granting certificate; affirmed. See also 115 Ohio St. 376, 154 N. E. 249.

Appearances: Blair & Ball, of Portsmouth, for plaintiff in error; Edward C. Turner, Attorney General, and Albert M. Calland, of Columbus, for defendant in error.

Per Curiam: It is ordered and adjudged by this court that the order of the said Public Utilities Commission of Ohio be, and the same is hereby, affirmed. This is an error proceeding from the Public Utilities Commission to review an order of the Commission granting a certificate of convenience and necessity to operate a motor transportation route between Portsmouth and Hillsboro, Ohio. A part of this route is covered by J. B. Lykins under a certificate granted by the Commission, but the certificate granted in this case to William McDaniel and O. G. Myers does not permit those operators to receive or discharge passengers at any points covered by the route certificated to Lykins. This court has carefully reviewed the evidence submitted to the Commission, and finds that the order of the Commission is fully sustained on the point of there being a convenienne and necessity to be served, and that the protestant Lykins is reasonably protected against the competition of the new operation. We,

therefore, find that the order is both reasonable and lawful, and the order of the Commission is affirmed.

Order affirmed.

Marshall, C. J., and Day, Allen, Kinkade, Robinson, Jones, and Matthias, JJ., concur.

VIRGINIA SUPREME COURT OF APPEALS.

NORFOLK & WESTERN RAILWAY COMPANY

v.

COMMONWEALTH EX REL. STATE CORPORATION COMMISSION.

(— Va. —, 139 S. E. 281.)

Appeal and review — Scope of Commission order — Order based on pleadings.

1. An order requiring the construction of a new station based on a petition that present passenger station is inadequate for either passenger or freight service, necessarily involves both kinds of service and provisions incident to either are not beyond the scope of the petition, p. 399.

Appeal and review — Scope of Commission order — Track layout.

2. An order changing the layout of track is incident to the improvement of station facilities granted under a petition complaining that the present station is inadequate for either passenger or freight service, and is, therefore, not beyond the issues made in pleadings of the petition, p. 399.

Procedure — Admission of irrelevant testimony at hearing — Effect on order.

3. Inadvertent admission of immaterial testimony, recognized as such by the chairman of the Commission, and discarded from consideration in formulating an ensuing order, does not invalidate the same, p. 399.

Appeal and review — Scope of power — Presumption in favor of Commission action.

4. Although the courts have jurisdiction under the State Constitution (clause (f) § 156) to determine the reasonableness and justice of the action of the State Corporation Commission, there is a prima facie presumption that the orders of that body are just, reasonable, and correct that must on review of the same be positively rebutted, p. 402.

Constitutional law — Due process — Order requiring new railroad station.

5. There can be no taking of property without due process of law

when an order is properly made requiring a railroad company to erect a new station, p. 404.

[September 22, 1927.]

APPEAL from order of State Corporation Commission; affirmed.

Appearances: M. B. Booker, of Halifax, and Lucian H. Cocke and Lucian H. Cocke, Jr., both of Roanoke, for appellant; Harman & Harman and J. Powell Royall, all of Tazewell, for appellees.

West, J.: This proceeding was instituted on a petition of the town of Tazewell, the town of North Tazewell, and the board of supervisors of Tazewell county, asking for an order requiring the Norfolk & Western Railway Company to improve its station facilities at Tazewell, Virginia. The case was heard upon the petition, the answer of the Norfolk & Western Railway Company, and the testimony taken on behalf of all parties.

The order appealed from was entered on July 19, 1926, and the material parts thereof read as follows:

"Upon consideration whereof, it appearing from the evidence and exhibits that the station facilities at Tazewell, Virginia, are inadequate to the needs of the public of that vicinity and patrons using the station involved, and that the allegations of the petition are sufficiently sustained, and that the service should be improved to meet the reasonable requirements of the public, and it further appearing from the evidence and exhibits that the present station facilities cannot be made to meet the needs of the public by remodeling or enlarging the existing building, and that, therefore, a new station should be built reasonably adequate to the needs and convenience of the public:

"It is, therefore, ordered that the Norfolk & Western Railway Company do, within a period of six months from the date of this order, construct a new station building and make such rearrangements of its track layout as to enable the patrons of the station, both passenger and freight, to use the station facilities with reasonable convenience and safety, in accordance with specifications which are ordered to be submitted to the State Corporation Commission for its approval; and, for the purposes of

considering such specifications and determining whether there has been a proper compliance with the provisions of this order, this case is ordered to be continued on the docket of this Commission for such further action on the part of the Commission as may be found necessary or advisable."

The Norfolk & Western Railway Company, appellant, makes four assignments of error.

[1, 2] Assignment No. 1 alleges that the order complained of is outside of the issues made in the pleadings and the prayer for relief contained in the petition.

The petition alleges that the present passenger station is used as both a passenger and a freight depot, and is insufficient for the purposes of either, and prays that the appellant be ordered to build a new passenger station. The answer denies the material allegations of the petition, and thereby puts the same in issue. It is apparent that any change in the present station or the substitution of a new station therefor would necessarily involve both the freight and passenger service. While nothing is said, in terms, in the petition about any needed change in the track layout, we think what the order says on that subject was incident to the improvement of the station facilities which the Commission granted. Appellant did not ask an opportunity to introduce testimony in rebuttal on that subject.

We find no merit in this assignment.

[3] The second assignment of error is that the order is based upon incompetent and irrelevant testimony. Appellant here refers to the testimony of the witness St. Clair, when he testified that the citizens of Tazewell were owners of extensive coal-mining operations in Virginia and West Virginia, which added greatly to the business of the appellant, and were, therefore, entitled to a new station in their home town. The chairman of the Commission, when objection was made, stated that this evidence was immaterial, and the "Statement of Facts and Reasons," made by the Commission, shows that they attached no weight to this testimony, in reaching their conclusions in the case.

We find no prejudicial error in this assignment.

The third assignment of error involves the sufficiency of the evidence to support the order; and the fourth assignment is that

the said order is void because it is arbitrary and unreasonable and deprives the appellant of its property without due process of law. These two assignments will be considered together.

Clause (f) of § 156 of the Virginia Constitution, relating to appeals from the State Corporation Commission, provides as follows:

". . . The chairman of the Commission, under the seal of the Commission, shall certify to the appellate court all the facts upon which the action appealed from was based and which may be essential for the proper decision of the appeal. . . . The Commission shall, whenever an appeal is taken therefrom, file with the record of the case, and as a part thereof, a written statement of the reasons upon which the action appealed from was based, and such statement shall be read and considered by the appellate court, upon disposing of the appeal. The appellate court shall have jurisdiction, on such appeal, to consider and determine the reasonableness and justness of the action of the Commission appealed from, as well as any other matter arising under such appeal: Provided, however, that the action of the Commission appealed from shall be regarded as prima facie just, reasonable and correct."

The Commission, in compliance with the foregoing section, filed a "Statement of Facts and Reasons" with the record.

Among the facts found are these, which we give practically in the language of the Commission:

The towns of Tazewell and North Tazewell are located nearly adjoining each other and have a joint population of 2,500 to 3,000 inhabitants. The Norfolk & Western Station at Tazewell, including the residents of these towns, serves 6,000 to 8,000 people in Tazewell county.

The station, which was built in 1890, is a frame structure of three rooms, the main waiting room 24x30 and two smaller rooms about 15x18 feet, one for men and the other for women. It is a combination freight and passenger station of the type usually found in small towns.

All persons, without regard to race, purchase tickets at the same window in the main waiting room. The building has no basement, and is heated by three stoves, one in each room. The

building is in need of extensive repairs, and is not kept in a first class sanitary condition. In the language of the Commission:

"It is, however, a fair deduction, and it is so found as a fact, that the mere matter of making the immediate necessary repairs and improving the character of the care given the station, so as to correct unsanitary conditions that exist would not be feasible and practicable in the present structure, nor would it make the station commensurate with the reasonable needs and requirements of the community, which is being served at that point."

The freight is handled from a platform built for that purpose, adjoining the passenger station and from a side track located between the station and the passenger track. Cattle pens are located close to the passenger station, and the loading and shifting of cattle cars renders the boarding and alighting from passenger trains inconvenient and unpleasant.

In 1915 the number of passengers boarding the train at Tazewell was 31,539. The incoming passengers, it is believed, nearly equaled that number. In 1925 the number of persons purchasing tickets was 14,775. Between 1915 and 1920 there was an increase, and thereafter a decrease, due to the extensive use of automobiles and bus lines.

The revenues derived by the Norfolk & Western Railway Company from passengers from Tazewell were, for 1915, $20,132.80, and for 1925, $19,621.01, a decrease of only $511.79. There was forwarded from Tazewell, May 1, 1925, to April 30, 1926, 60,287,895 pounds of carload freight, from which the Norfolk & Western Railway Company's proportion of revenue was $102,053.67, and 6,244,051 pounds of less than carload freight, from which the Norfolk & Western Railway Company's proportion of the revenue was $16,889.80.

There was received at Tazewell during the same period 76,076,923 pounds of carload freight, from which the Norfolk & Western Railway Company's proportion of the revenue was $89,881.01, and 4,360,030 pounds of less than carload freight, from which the Norfolk & Western's proportion of revenue was $25,747.14.

Tazewell is a relatively important station, and extensive re-

pairs to the station building are needed and have been under consideration by the company for some time. It appears from an exhibit filed as evidence that N. D. Maher, president of the Norfolk & Western, wrote a letter to the president of the Board of Trade of Tazewell, in April, 1916, in which he acknowleged the need of a better station at that point and virtually promised to erect a new station as soon as conditions became a little more favorable.

Referring to the station building, the Commission says:

"The facts of the age and character of the station structure, the absence of any basement or any place for a central heating plant, the extensive character of repairs which would be necessary in order to maintain a proper separation of the races and the furnishing of proper conveniences for the traveling public. constitute any attempt at remodeling, or repairing, of the existing building impracticable."

[4] Under clause (f), § 156, of the Constitution, *supra,* this court has jurisdiction to determine the reasonableness and justice of the action of the Commission appealed from, but such action shall be regarded by the court as prima facie just, reasonable, and correct. Unless this presumption is rebutted, the judgment of the Commission must be affirmed.

It is contended that the order under review is without evidence to support it.

There is evidence, which, if believed, sustains the facts found by the Commission, and shows that the passenger station at Tazewell is in a very dilapidated and unsanitary condition, and does not provide proper and reasonable comfort and convenience to the public who avail themselves of the company's service at the station, and that its condition is such that it would be impracticable, if not impossible, to repair it and improve it so as to furnish the passenger patrons of the company the comfort and convenience which is their due.

J. W. Whitley, witness for the petitioners, testified as follows:

"Q. Do you think, considering the age of the depot and its present condition, it can be patched up and made comfortable and sanitary?

"A. Well, I hardly see how you could do it. Of course it is

possible to do those things, but I don't see how you could make any kind of a depot out of an old house, with the sills rotten, and as unsightly a building as that is.

"Q. As a practical proposition, you think it is better to have a new building, built on modern lines, heated by a furnace?

"A. I don't believe you could possibly heat that old building. It has a plain wall planked up and down with strips on it; you couldn't possibly put any heat in that. It froze up, a member of the council called their attention to it, and the pipes burst in the depot."

Petitioner's witness George W. St. Clair testified to practically the same effect.

In requiring railroad companies to improve their station facilities, the authorities exercising that power must have a due regard for the comfort and convenience of those availing themselves of the service, on the one hand, and of the company's financial condition on the other. The Commission has no authority to require the erection of a new station simply because the old one has an unattractive appearance. The law requires that the business of the carrier shall be conducted in an efficient and economical manner, with reasonable expenditures for structures and equipment. Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585. The requirements laid upon the carrier must be reasonable and just.

A proper regard for the interests of the stockholders and the public generally forbids that public carriers erect handsome and expensive station buildings at every station. Such a course would bankrupt a large per cent of the railroads of the country.

It appears from records filed with the State Corporation Commission, and is a matter of common knowledge, that the Norfolk & Western Railway Company is in a very prosperous condition, and can easily pay the cost of a new station wherever, under the law, it can be properly required to erect the same.

The station at Tazewell is of the type, except somewhat larger, usually constructed at the small wayside stations. It is a matter of common knowledge that the Norfolk & Western Railway Company very often voluntarily provides a more comfortable and more expensive type of station than the one at Tazewell, where

it serves towns of 2,500 to 3,000 inhabitants, and a large rural population.

[5] There can be no taking of property without due process of law, where an order is properly made requiring a railroad company to erect a new station. Under the facts disclosed by the record, the action of the Commission was not in violation of any constitutional rights of the defendant.

For the foregoing reasons, we find no error in the order complained of, and it will be affirmed.

Affirmed.

Prentis, P., absent.

OHIO SUPREME COURT.

OHIO VALLEY TRANSIT COMPANY

v.

PUBLIC UTILITIES COMMISSION OF OHIO.

[No. 20414.]

WHEELING TRACTION COMPANY

v.

PUBLIC UTILITIES COMMISSION OF OHIO.

[No. 20415.]

PENNSYLVANIA RAILROAD COMPANY

v.

PUBLIC UTILITIES COMMISSION OF OHIO.

[No. 20436.]

(— Ohio St. —, 158 N. E. 182.)

Monopoly and competition — Power of Commission to grant certificate over existing route — Busses.

A certificate of convenience and necessity to operate through bus service without a right of pick-up over territory already adequately served by existing carriers, is properly granted where, in view of the character of service rendered by existing transportation utilities in the territory as a whole, no other through route would be as convenient for public needs.

[June 15, 1927.]

P.U.R.1928A.

PROCEEDING to review order of the Public Utilities Commission granting a certificate of convenience and necessity; affirmed.

Appearances: Gordon D. Kinder, of Martins Ferry, for plaintiffs in error Ohio Valley Transit Company and Wheeling Traction Company; Henderson & Burr and Sherman B. Randall, all of Columbus, and A. M. Donnan, of Pittsburgh, for plaintiff in error Pennsylvania Railroad Company; Edward C. Turner, Attorney General, A. M. Calland, of Columbus, Robert E. Marshall, of Sidney, and Harry B. Holmes, of Columbus, for defendant in error.

Per Curiam: On June 17, 1926, one M. D. Boich applied for a certificate of public convenience and necessity to operate a motorbus line, consisting of five busses of five passengers each, between the cities of Steubenville and Bridgeport, Ohio, a distance of about 24 miles. Between these termini are Rayland, about 9 miles north of Bridgeport, Brilliant, about 9 miles north of Rayland, and Steubenville, a city, located about 6 miles north of Brilliant. Three protests were filed opposing the application. The Ohio Transit Company, an existing motorbus line carrying passengers between Steubenville and Rayland, through Brilliant, filed its protest. The Wheeling Traction Company, operating interurban cars between Steubenville and Brilliant and between Bridgeport and Rayland on the Ohio side of the Ohio river, also protested. There is no interurban connection on the Ohio side between Brilliant and Rayland. The Wheeling Traction Company also operates an interurban line on the West Virginia side of the Ohio river between Wheeling and Steubenville, crossing the river at that point.

Another protestant was the Pennsylvania Railroad Company, operating a steam line on the Ohio side between Bridgeport and Steubenville, and also another line on the West Virginia side of the Ohio river between Wheeling and a point in West Virginia opposite Steubenville.

These protests were all heard together by the Commission. After hearing, the Public Utilities Commission made an order effective March 1, 1927, granting to Boich a certificate of public convenience and necessity, authorizing him to operate between Bridgeport and the city of Steubenville upon the condition that

no passengers should be taken on or discharged "whose entire ride is intermediate to points between Steubenville and Bridgeport," and that the certificate issued should be limited to through passengers. Rehearings were asked for and denied by the Commission, whereupon the three protestants, the plaintiffs in error, prosecuted error to this court.

Since no passenger pick-up was allowed by the Commission at intermediate points between Steubenville and Bridgeport, we have here only the consideration of through service between those termini. The highway route over which the applicant applied for a certificate parallels very closely the existing transportation lines on the west side of the Ohio river.

Steubenville and Bridgeport are municipalities of considerable population, and between them are a number of villages and towns. The valley between, as stated by the Commission, "is thickly settled, and the record shows that there is a steady flow of passenger traffic between those two points." On the east side of the river, in West Virginia, and between Wheeling and a point opposite Steubenville, the Pennsylvania Railroad Company operates six trains a day each way; also on the same side of the river, in West Virginia, the Wheeling Traction Company every half-hour operates each way between Steubenville and Wheeling, crossing the bridge at Steubenville, making the trip in 1½ hours according to their time schedule. However, one witness testified this service is rendered in one hour and twenty minutes; upon arriving at Wheeling, some further time is necessary to cross west by street car over the Ohio river into Bridgeport.

On the Ohio side of the Ohio river are found the following existing lines of transportation, to wit, the Pennsylvania Railroad Company, operating three trains daily each way between Steubenville and Bridgeport, leaving Steubenville for points south at 11:54 A. M., 5 P. M., and 7:21 P. M., leaving Bridgeport for Steubenville at 6 A. M., 1:15 P. M., and 4:05 P. M. The Wheeling & Lake Erie also operates two trains a day each way from Steubenville by way of Martins Ferry; but the record discloses that this service is very unsatisfactory.

In addition to the line on the West Virginia side of the river, the Wheeling Traction Company operates car service on a 20-

minute headway between Steubenville and Brilliant, 6 miles south. South of Brilliant, between Brilliant and Rayland, there is no interurban connection; however, there is traction service between Rayland and Bridgeport. The Ohio Transit Company, one of the plaintiffs in error, operates motorbusses between Steubenville and Rayland upon a 1½-hour schedule, week days, and on a one hour schedule on Saturdays and Sundays; at Rayland a connection can be made with the Wheeling Traction Company, operating a one-half hour service between Rayland and Bridgeport.

Several witnesses were called by the applicant, who testified to the necessity of further service and of the inadequacy of the service on the present existing transportation lines. Other witnesses were also offered by the applicant, who were not heard by the Commission, because it felt that their testimony would be cumulative merely. There was testimony to the effect that the existing transportation lines, especially those east of the Ohio river, accrued to the advantage of the business interests of West Virginia and that they were unsatisfactory to the business interests of that part of Ohio immediately west of the Ohio river.

The protests of the existing transportation lines rest largely on the evidence offered by them showing their time schedules between Steubenville and Bridgeport. They rely largely upon these schedules as sustaining their contention that the service between Steubenville and Bridgeport is adequate. On the West Virginia side of the river there are six trains a day each way on the Pennsylvania Railroad, but to reach either Steubenville or Bridgeport other connections have to be made to get across the Ohio river to those termini. On the same side of the river the Wheeling Traction Company, as stated, has half-hour service between Steubenville and Wheeling, and further time is necessary to cross the Ohio river between Wheeling and Bridgeport by street car.

Necessarily the public convenience and necessity would be much better served, as the Commission found, by through bus service between Steubenville and Bridgeport on the Ohio side. The applicant's schedule discloses that the time of his trip between Bridgeport and Steubenville is one hour, and that his time

schedule between those points is hourly between 7 A. M. and 8 P. M. It is manifest from the record that there was little public convenience by way of transportation on the two steam lines on the west side of the Ohio river between Steubenville and Bridgeport, since the Pennsylvania Railroad ran but three trains per day each way, while the Wheeling and Lake Erie operated two trains daily each way, and this service was very unsatisfactory. This left, therefore, for the consideration of the Commission, the other transportation facilities between Steubenville and Bridgeport.

The Ohio Transit Company, affiliated with the traction company, has motorbus transportation between Steubenville and Rayland about 15 miles south, where connection is made with the traction company for Bridgeport. Under the existing transportation system in that valley west of the river, if a through passenger between Bridgeport and Steubenville embarks on the Wheeling Traction Company line at Steubenville he would have to make two connections for Bridgeport, one at Brilliant and another at Rayland; if he uses the bus line of the Ohio Transit Company, in going to or from Steubenville or Bridgeport, he must make connection with the traction company at Rayland.

Referring to this inadequacy of service, the Commission in its order said:

"It was evident from the testimony adduced at this hearing that the through service is not reasonably adequate nor such as this densely populated valley is entitled to. The objections are that transfers are necessary and that the combined running time of the bus traction car lines does not meet the convenience of the traveling public between the two points."

The Commission found that the service rendered by the protestants in this territory was not such as met the necessity and convenience of the traveling public and the residents of the territory proposed to be served, and was not reasonably adequate in that respect.

When consideration is given to the character of service rendered by the existing transportation companies, especially on the west side of the river, and also to the public necessity and convenience of the territory sought to be served, this court is

unable to say that the order of the Commission was unlawful or unreasonable, of that the evidence did not justify the order of the Commission granting to the applicant the certificate for through service, without the right of pick-up, between Steubenville and Bridgeport. "This court will not substitute its own judgment for that of the Commission unless an order based thereon is against the manifest weight of the evidence." Lykins v. Public Utilities Commission, 115 Ohio St. 376, 154 N. E. 249.

The order of the Commission is affirmed.

Order affirmed.

Marshall, C. J., and Day, Allen, Kinkade, Robinson, Jones, and Matthias, JJ., concur.

VIRGINIA SPECIAL COURT OF APPEALS.

MORDAUNT ETHEREDGE

v.

CITY OF NORFOLK.

(— Va. —, 139 S. E. 508.)

Municipal plants — General powers of municipality — Ordinances — Similar private utility.

1. The ordinance of a municipality engaged in furnishing water prescribing regulations for the same, has no greater force than the by-law of a private corporation enfranchised to do business of a like character, since both stand on the same footing and have exactly the same right to make and enforce reasonable rules and regulations, p. 413.

Constitutional law — Due process — Lien against property owner for tenant's bill — Water.

2. In the absence of statutory authority creating a property lien, by virtue of charter or otherwise, an ordinance of a municipality operating a water works which requires an owner to pay a delinquent bill for water furnished the tenant of his premises regardless of contractual obligations, is unreasonable and void, p. 413.

Constitutional law — Police power — Ordinance holding owners for tenant's water bills.

3. An ordinance of a municipality engaged in furnishing water, which holds property owners personally responsible for the arrears of tenants, when otherwise void for lack of statutory authority, may be sustained only if proven to be a valid exercise of police power of the city, p. 415.

P.U.R.1928A.

Constitutional law — Police power — Ordinance of municipal water utility — Public health.

4. The fact that a constant supply of water is necessary to seal sewer traps in city premises against the discharge of noxious gases and infectious insects emanating from the city mains is not a sufficiently substantial relation to public health to permit the enforcement, as a valid exercise of police power, of an ordinance holding owners personally liable for water consumed by their tenants regardless of contract, p. 415.

Constitutional law — Police power — Ordinance assuming to protect public health — Water rents.

5. An ordinance purporting to preserve public health but clearly designed to enforce collection of water rents is manifestly foreign to its alleged purpose and is an arbitrary, unreasonable, and unconstitutional infringement of property rights under the guise of police regulation, p. 418.

[September 29, 1927.]

ERROR to Circuit Court of city of Norfolk; reversed and judgment entered for trial defendant (present plaintiff in error.)

Appearances: William G. Maupin, of Norfolk, for plaintiff in error; R. W. Peatross, of Norfolk, and George Read Martin, for defendant in error.

Chinn, J.: The city of Norfolk is authorized by its charter to provide an "adequate water supply for said city" and "to establish, impose, and enforce water rates."

A certain ordinance passed by the city, known as § 156 of the Norfolk City Code, 1920, reads as follows:

"Section 156. *Both Owner and Occupant Responsible for Supply of Water to Premises Connected with City Sewer.*

"The owner of any premises which are required by the city ordinances to be connected with the city sewer shall see that water from the waterworks of the city is connected with said sewerage on said premises, and not cut off therefrom at any time, except for necessary repairs, while said premises are occupied, and such owner shall cause the water rent for the use of water on said premises to be paid the division of water supply when due.

"Any person occupying any premises required by the city ordinances to be connected with the city sewer shall see that the water from the waterworks of the city is connected with the sewer on said premises, and not cut off therefrom; and no person shall

occupy any premises required by the ordinances of the city to be connected with the city sewer, if the sewer on the premises is not connected with, or is cut off from, water from the waterworks of the city, except when necessary for repairs.

"No person shall use a water closet which is not connected with water from the waterworks of the city, or which is cut off therefrom.

"Any violation of this section shall be punished by a fine of not less than twenty dollars nor more than one hundred dollars for each offense.

"Nothing contained in this section shall be construed as prohibiting the department of public works from cutting off water from any premises upon the failure of the owner or tenant to pay the water rent."

On December 21, 1924, the city adopted an ordinance, amending the then existing ordinance, entitled "An ordinance prescribing a ready-to-serve charge for water consumers, fixing the rates to be paid for water," etc., by which it was provided that each person using water furnished from the city water system should pay a flat quarterly rate wherever a meter was installed, and an additional charge per quarter for each additional 1,000 gallons of water consumed, varying with the quantity used. This ordinance goes on to provide that a penalty of 10 per cent shall be added to the bill in case it is not paid on or before the 15th day of the month in which the bill is rendered, and further declares that:

"Whenever any bill for service or water shall remain unpaid thirty days after the first of the month in which the same is due, the bureau of water shall cut off water from said premises, and shall not turn the same on again until all delinquent charges therefor have been paid in full."

Claiming its right to do so by virtue of the provisions of the above ordinances, the water bureau of the city has pursued the method of charging and billing all water rents to the premises supplied with water, instead of to the owner or occupant of the premises. If the bill is not paid, no attempt is made to collect it from the occupant or consumer, as such, but the owner of the premises alone is held responsible, and, if he refuses to pay, the

water is shut off until the delinquent bill is settled. It seems that this system has given rise to considerable friction and controversy between property owners and the city authorities whenever a tenant has vacated the leased premises leaving a delinquent water bill.

With this preliminary statement, the facts of the case presented by the record may be fairly stated in the language of the petition for writ of error, as follows:

"Mordaunt Etheredge bought in January, 1914, and has owned ever since, the premises, No. 300 Park avenue, Norfolk. He has never occupied the premises; never consumed any water therein; never made any contract with the city for water to be consumed therein; and never paid for any water so consumed. One Mrs. C. De Waters entered the premises under a written lease from Etheredge and occupied them from September 1, 1924, until September 30, 1925; and in said lease she covenanted to pay 'all water rents levied, or to be levied, thereon during the term.'

"Mrs. De Waters moved out at the expiration of her term. It afterwards developed that a bill for consumption of water furnished said premises during the period beginning May 8, 1925, and ending August 6, 1925 (while Mrs. De Waters occupied them), amounting to $12.38, remained unpaid.

"Etheredge knew nothing about the unpaid water bill until after Mrs. De Waters moved out. A new tenant was secured, who, upon going to the water department to arrange for water, was there advised of the unpaid bill and told that unless it was paid water would be cut off. The new tenant reported the situation to Etheredge and declined to move in unless the matter was adjusted.

"Thereupon Etheredge took the matter up with the city authorities and received from them a letter threatening to cut off the water unless the delinquent De Waters' bill was paid at once. He notified the attorney representing the Norfolk real estate board (of which Etheredge was a member), and the attorney notified the city that, if the threatened action was taken, mandamus proceedings and a suit for damages would be brought.

"The water was not cut off, but this proceeding—a motion for

the recovery of money—was instituted by the city of Norfolk against Mordaunt Etheredge for the said sum of $12.38 represented by the delinquent water bill in question.

"It should be stated that this amount of $12.38 was made up of two items. One item of $2.50 represented the 'ready-to-serve' or 'advance quarterly' charge; and the balance, $9.88, was for the consumption of water, as shown by meter readings."

Etheredge, having agreed to pay the ready-to-serve charge, paid into court the said sum of $2.50, and, both parties waiving a jury, all matters of law and fact were submitted to the court. A judgment for $12.38, less the aforesaid credit of $2.50 was entered in favor of the city, and thereupon Etheredge obtained this writ of error.

[1, 2] The city's right to recover in this case being based solely upon the provisions of § 156 of the Norfolk City Code, the specific question presented for decision is whether that ordinance in so far as it seeks to make the owner of premises personally liable, irrespective of contract, for water consumed upon such owner's premises by a lessee thereof, is repugnant to the 14th Amendment of the Constitution of the United States and to § 11 of the Constitution of Virginia, in that it deprives such owner of his property without due process of law.

The books abound in adjudications involving various questions pertaining to the enforcement of water rents, and the respective rights of municipalities and private companies operating waterworks, on the one side, and the owner or occupant of the premises, on the other; and while the question generally presented in these cases has been as to the reasonableness and validity of a specified ordinance or regulation and the right of the municipality or water company, acting under such ordinance or regulation, to shut off the water from the premises, and not the precise question of the owner's personal liability, as presented here, certain rules have been enunciated by the courts which may now be considered as firmly established. For instance, it seems to be agreed by all the authorities that when a municipal corporation engages in the business of furnishing water to its inhabitants by means of a permanent waterworks, it stands on the same footing, and has exactly the same right to make and enforce reasonable

rules and regulations, as a private corporation upon whom a franchise for that purpose has been conferred, and, therefore, an ordinance prescribing such regulations has the same force, and no more, of a by-law of a private corporation whose powers are of like character and conferred for the same purpose. 1 Farnham on Waters and Water Rights, § 158, p. 814; 27 R. C. L. p. 1408; 3 Dillon on Municipal Corporations, p. 2204; Brumm, Appeal of (Pa.) 12 Atl. 855; State ex rel. Scotillo v. Albuquerque Water Supply Co. 19 N. M. 27, 140 Pac. 1056, L.R.A.1915A, 242; Girard Life Insurance Co. v. Philadelphia, 88 Pa. 393; St. Louis Brewing Asso. v. St. Louis, 140 Mo. 419, 37 S. W. 525, 41 S. W. 911; Chicago v. Northwestern Mut. Life Insurance Co. 218 Ill. 40, 75 N. E. 803, 1 L.R.A.(N.S.) 770.

The authorities are also practically unanimous that the regulation of a water company or ordinance of a municipality which requires the property owner to pay a delinquent bill for water furnished the tenant of the premises, which the owner has not contracted to pay, is unreasonable and void, unless a lien is given on the premises by statute, *or there is at least some statutory authority therefor by virtue of the charter or otherwise.* Turner v. Revere Water Co. 171 Mass. 329, 50 N. E. 634, 40 L.R.A. 657, 68 Am. St. Rep. 432; Covington v. Ratterman, 128 Ky. 336, 108 S. W. 297, 17 L.R.A.(N.S.) 923; Burke v. Water Valley, 87 Miss. 732, 40 So. 820, 112 Am. St. Rep. 468; McDowell v. Avon-by-the-Sea Land & Improv. Co. 71 N. J. Eq. 109, 63 Atl. 13; Chicago v. Northwestern Mut. Life Insurance Co. *supra;* State ex rel. Scotillo v. Albuquerque Water Supply Co. *supra;* Wood v. Auburn, 87 Me. 287, 32 Atl. 906, 29 L.R.A. 376; Millville Improv. Co. v. Millville Water Co. 92 N. J. Eq. 480, 113 Atl. 516; Sheldon v. Hamilton, 22 R. I. 230, 47 Atl. 316, 84 Am. St. Rep. 839; Waldron v. International Water Co. 95 Vt. 135, 112 Atl. 219, 13 A.L.R. 340; Linne v. Bredes, 43 Wash. 540, 86 Pac. 858, 6 L.R.A.(N.S.) 707, 117 Am. St. Rep. 1068, 11 Ann. Cas. 238; 27 R. C. L. p. 1455; 16 R. C. L. pp. 820–822. Authorities to this effect might be multiplied.

"In the absence of legislative authority therefor, a regulation providing that the water supply may be shut off for nonpayment is unreasonable in so far as it may be construed to authorize cut-

ting off the supply when a tenant refuses to pay delinquent water rents owed by a former occupant or owner, as to do so would compel one man to pay another's debt in order to obtain a necessity. . . . The right of a municipal corporation or water company to compel a property owner to pay for water furnished to a former occupant seems to depend on the existence of a lien against the property." 27 R. C. L. p. 1455.

[3] Neither the charter of the city of Norfolk nor any other statute provides a lien on property for water rents; nor is there any statutory authority, so far as we are advised, for the ordinance in question. This being so, said ordinance, in so far as it attempts to hold a property owner personally responsible for the payment of arrearages for water consumed by the tenant on the premises, is unreasonable and void, unless, as contended by counsel for the city, that provision of the ordinance is necessary for the protection of the public health, and, for that reason, a valid exercise of the police power of the city.

[4] That the city of Norfolk has the right, in the exercise of its police power, to adopt such regulations as are reasonable and necessary for the protection of the health of its inhabitants, is, of course, beyond question. As has often been said, the police power has never been exactly defined or circumscribed by fixed limits; but "the police power has been described as the *law of necessity,* and as the power of self-protection on the part of the community. This doctrine may be said to furnish the key to what is within and what is without the boundaries of such power; not that a police regulation to be legitimate must be an absolute essential to the public welfare, but that the exigency to be met must so concern such welfare as to suggest, reasonably, *necessity* for the legislative remedy." 6 R. C. L. § 187. (Italics supplied.)

In Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121, 1129, the court quotes from 1 Lewis on Eminent Domain, § 249, as follows:

"The Supreme Court of the United States, which is the final arbiter upon these questions, says: 'The validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the

circumstances of each case and the character of the regulation, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose. . . . If the means employed have no real substantial relation to the public objects which government may legally accomplish, if they are arbitrary and unreasonably beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action.' "

In Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133, the Supreme Court of the United States says:

"It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the 14th Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. . . . In every case . . . the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual? . . . The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate. . . ." (at pp. 56, 57).

The city's contention—that the ordinance was enacted in the exercise of the police power to protect the public health—is based upon the following facts:

That a city ordinance requires all buildings in the city adjacent to a sewer line to be connected therewith, and under the building regulations connections with the city sewer are required to be made with traps so designed as to prevent, when filled with water,

sewer gases, and disease carrying insects from entering the house; that all the water which enters the house through the meter, and not consumed, passes out through these traps; that sewer gas is a noxious and poisonous gas, and unless the sewer system of the house is connected with the water system the house would be uninhabitable.

It is not claimed, and no attempt was made to show, that the building belonging to Etheredge is not connected with the city sewer, or that the connections are not constructed according to the building regulations. Nor is it claimed that it would be injurious to the public health to shut off water from an unoccupied building. The whole contention, then, resolves itself into this: That it would be unhealthful to live in a house from which the water had been cut off, and for that reason the property owner should be required to pay the water rent in order to conserve the health of his tenants. We think it would be just as unreasonable as a police regulation to require him to do this as it would be to require him, in the absence of contract, to furnish his tenant with any other necessity which would conduce to the preservation of the tenant's health. The regulation is also unreasonable in its effects, because it requires the property owner—as in this case—to pay the delinquent water bill of a former tenant, which he is under no obligation to pay, in order to secure another tenant and keep his premises occupied, and denies the incoming tenant the use of the water to which he is entitled when he occupies the premises and offers to comply with the regulations required of consumers. The language of the court in Waldron v. International Water Co. 95 Vt. 135, 140, 141, 112 Atl. 219, 13 A.L.R. 340, 344, is pertinent here:

"A regulation of a water company unauthorized by statute, requiring a property owner [landlord] to pay for water, . . . is unenforceable. . . . Brass v. Rathbone, 153 N. Y. 435, 47 N. E. 905; Stein v. McArdle, 24 Ala. 344. Neither can he be held liable for the bills of his tenant. McCarthy v. Humphrey, 105 Iowa, 535, 75 N. W. 314. Nor can his premises be subjected to a lien for such charges. Turner v. Revere Water Co. 171 Mass. 329, 50 N. E. 634, 40 L.R.A. 657, 68 Am. St. Rep. 432. . . . A rule that the water company will deal only with the

owners of property occupied by tenants, if valid, would enlarge the obligation of the landlord to the tenant to the extent of requiring the former to furnish water, and pay the water assessments in order that the premises might be occupied, and, in case the landlord was in arrears, would deny the tenant the right of water service to which he is entitled . . . unless he paid the landlord's debt."

Nor do we see any necessity for such a provision. It is important, of course, to the financial interests of the city that it should collect its water charges and derive sufficient revenue therefrom to maintain its waterworks; and it is true that the plan it has adopted, of charging such bills to the premises, and holding the landowner responsible under any and all circumstances, under the penalty of making his house uninhabitable by cutting off the water, furnishes a simple and easy way of collecting its water rents. But, as said by the court in Turner v. Revere Water Co. *supra*:

"It may be desirable that a water company or a gas company should have an easy way of collecting its debts, but we see no reason why it should be enabled by the court to collect a debt from one who is not a party to the contract, when it sells its commodity on credit." (At p. 335.)

The city can adopt any reasonable plan it chooses to collect its water rents from the consumers who obligate themselves to pay them, in lieu of the present arbitrary and unreasonable policy of attempting to exact such rents from those who are in no way liable, in the absence of state legislative enactment making them so. In fact, under its present ordinances, if a tenant or any consumer fails to pay his water bill, the city has the lawful right to cut off the water until he does pay it, and, if he continues to occupy the premises with the water shut off, can subject him to a fine; which of itself seems not only a proper method of enforcing payment, but a reasonable police regulation, as well.

[5] Reading the two ordinances herein before referred to together, it is obvious that the provision of § 156 of the Norfolk City Code which is now under consideration was designed to enforce the collection of water rents and not as a health regulation. It has at the most only a remote connection with the public

health—a connection by far too remote to justify us in sustaining it as a police regulation on that ground. We, therefore, conclude that said ordinance, in so far as it requires a property owner, in the absence of contract, to pay rent due the city of Norfolk for water consumed on the premises by the tenant, is not only unreasonable and unnecessary, but foreign to the purpose alleged, and same is, therefore, unconstitutional and void. In this case it constitutes an arbitrary infringment upon the rights of Mr. Etheredge.

"When a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the courts must be able to see that it has at least in fact some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adapted to that end." In Re Jacobs, 98 N. Y. 98, 115, 50 Am. Rep. 636.

"A law which assumes to be a police regulation but deprives the citizen of the use of his property under the pretense of preserving the public health," the public "safety, comfort, or welfare, when it is manifest that such is not the real . . . purpose of the regulation, will be set aside as a clear and direct invasion of the right of property without any compensating advantages. Cooley's Const. Lim. 248." Spann v. Dallas, 111 Tex. 350, 235 S. W. 513, 19 A.L.R. 1387.

"The well-settled rule is that, if a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution." Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086.

Before concluding this opinion, we feel that, inasmuch as we are constrained to differ with the learned judge of the trial court, the case of East Grand Forks v. Luck, 97 Minn. 373, 107 N. W. 393, 6 L.R.A.(N.S.) 198, 7 Ann. Cas. 1015, upon which his opinion is based, should be referred to. In that case suit was brought by the city against the property owner to recover a bill due the city for light furnished the tenant. An examination of

the court's opinion in the case will show that the owner was held liable on the ground that the charter granted the city by act of the state legislature expressly provided that the owner of private property, as well as the lessee, shall be liable to the city for light and water used on the premises, and that the rates and rents therefor may be recovered in an action against such owner or lessee; the theory of the court being that the lease was made with reference to the provisions of the charter and the owner was bound under an implied contract. While this decision is in conflict with what seems to be the greater weight of opinion holding that the owner is not bound in the absence of a statutory lien, we do not consider it is necessary to concern ourselves in this case as to which line of cases should be followed, for the reason that the charter of the city of Norfolk contains no such provision as that involved in the Luck Case, *supra,* nor is there any other statute giving said city such authority.

A full and detailed statement of the rules applicable to cases of this character will be found in 16 R. C. L. § 316, pp. 820–822, from which we quote the following:

"In the absence of a statutory provision a private water or light company has no lien or charge upon the premises to which water or light is furnished; . . . and a regulation of a water or light company attempting to impose a charge upon the premises *so as to affect the right of subsequent occupants to be supplied will, unless authorized by statute, be invalid as unreasonable.* The same has been held to be true, in the absence of statutory sanction, where a municipality is engaged in furnishing water or light to its inhabitants. It is held that a tenant of a building is himself entitled to be furnished with water and light, and a water company must deal with him as its customer, *and has no power to require that the landlord become responsible for the charges, or consent that they be a charge on the premises,* . . . and likewise where water or light is furnished a tenant the company has no right to refuse after the termination of the tenancy to furnish water or light to the landlord or his subsequent tenants because the prior tenant was in default in the payment for water or light supplied to him; in other words, the charges for water or light furnished a tenant does not create any charge upon

the reversion or effect the duty of the company to supply the landlord or his subsequent tenants. On the other hand, a *statute* may make the charge for water or light furnished a charge upon the premises and authorized the supply to be shut off, in case there has been default in the payment; . . . and this has sometimes been done in the *charter* of a municipality in cases where the municipality is authorized to engage in the supply of water and light to its inhabitants. . . . *Under such a provision* the municipality has been held justified when default has been made in the payment for water or light furnished a tenant, in refusing, after the termination of the tenancy, to furnish water or light to the landlord or his subsequent tenants unless the prior charges are paid, or entitled to hold the premises or the landlord personally liable for water or light furnished the tenant." (Italics supplied.)

For the foregoing reasons the judgment of the court below will be reversed, and judgment entered here for the defendant therein.

Reversed.

WASHINGTON SUPREME COURT.

STATE EX REL. H. E. BYRAM et al.

v.

DEPARTMENT OF PUBLIC WORKS OF WASHINGTON.

[No. 20524.]

(— Wash. —, 257 Pac. 634.)

Appeal and review — Scope of review — Conclusiveness of Commission findings.

1. A return of the Department of Public Works to the supreme court of Washington for review may include petitions, resolutions, letters, and anything else received by the Department in aid of the case, in view of the informal nature of such proceedings, the court always assuming that the Department admitted no improper testimony unless the contrary plainly appears on the face of the record, p. 423.

P.U.R.1928A.

Certificate of convenience and necessity — Evidence of necessity — Exemption of agricultural products.

2. Despite a statute (Laws 1923, p. 239) exempting from the necessity of a certificate "motor propelled vehicles operated exclusively in transporting agricultural . . . or other farm products," the Commission is not prevented from considering the hauling of these articles in conjunction with the hauling of other articles as evidence of public necessity, and is entitled to consider the needs of the community as a whole in granting a license therefor, p. 424.

Appeal and review — Scope of review — Conclusiveness of findings of Commission.

3. The findings and conclusions of the Commission as to facts are vested with the presumption of truth and accuracy, and without clear and substantial evidence of palpable error will be undisturbed and its judgment within its proper jurisdiction respected, p. 425.

[June 27, 1927.]

PROCEEDING to review action of Department of Public Works in granting a certificate of convenience and necessity to haul freight; judgment affirming Commission decision sustained.

Appearances: F. M. Dudley and A. J. Laughon, both of Seattle, and W. A. Robbins and T. H. Maguire, both of Portland, for appellants; John H. Dunbar and H. C. Brodie, both of Olympia (Frank P. Christensen, of Olympia, of counsel), for respondent.

French, J.: Since December, 1924, Don D. Irwin, under contract with the publisher of the Morning Oregonian, has delivered that paper to local points along the highway between Centralia and Hoquiam. He uses a Ford truck, receiving the papers at Centralia, making terminal deliveries to Grays Harbor destinations at about 6 o'clock A. M. In connection with his newspaper service between these points he has been delivering butter from the Centralia Creamery to logging camps along the route, has handled packages for farmers; his tonnage in that respect averaging about two hundred pounds per day. The route traverses a farming community of approximately one hundred fifty farms, passes through the intermediate cities and towns of Montesano, Elma, Porter, Oakville, Rochester, and Grand Mound. The farm products raised along the route have a market in the municipalities. The territory is served by three railroads, one of which practically parallels the highway over which Mr.

Irwin operates. These railroad lines furnish daily freight and express service to the towns, cities, and sidings, with free delivery and express service twice each day in Hoquiam, Aberdeen, Montesano, Elma, Centralia, and Chehalis. The farming communities have truck service for milk and cream, and an association provides truck service for use of its members in the collection and delivery of eggs and other farm produce. Some truck peddlers go through the farming district, collect the produce, and sell to the merchants in the cities. Also the produce houses in Hoquiam and Aberdeen from time to time send their trucks into the farming communities and buy produce for the market. The various oil companies deliver their gas and oil products to the different stations along the route.

In April, 1925, Mr. Irwin filed his application with the Department of Public Works for a certificate of convenience and necessity authorizing him to furnish freight service by motor vehicle between Hoquiam, Aberdeen, Chehalis, Centralia, and intermediate points. Protests were filed, a hearing had, evidence introduced, and the application was denied. Again in February, 1926, another like application was made, which was denied without a hearing. In April, 1926, the Department set aside its second order, a hearing was had, and in May, 1926, the application was granted. Thereafter the protesting railway companies and the American Railway Express Company applied to the superior court for a writ of review. The writ issued as prayed for, and the Department filed in the superior court its return to the writ. There was embodied in the return over its certificate a transcript of the testimony introduced at the hearing, together with a quantity of letters, telegrams, and unverified petitions that had been addressed to the Department. Many of the telegrams and letters were dated subsequent to the hearing, and the signatures to typewritten petitions contained names of persons who were not called as witnesses. Thereafter the superior court by its judgment affirmed the findings and order of the Department of Public Works, and this appeal follows.

[1] Appellants' first contention is that the return includes petitions, resolutions, and letters which do not properly belong in the return.

We think it sufficient to say that under the Auto Transportation Act (Laws 1921, p. 338, as amended by Laws 1923, p. 239) the proceedings are informal; that the documents complained of, having been sent to the Department and purporting to relate to this case, even though not considered by the Department, were properly included in its return. Having certified to the superior court everything which had been received and which in any way pertained to the controversy, whether received in the form of sworn testimony or in the form of letters, telegrams, and petitions, the Department had fully performed its duty in so far as the return was concerned. The proceedings being informal as above stated, we know of no practical method whereby the Department could refuse to receive such documents. We must assume that the Commission considered only proper testimony, unless the contrary clearly appears from the record.

[2] On the merits of the controversy, the only serious complaint made was that the evidence does not support the findings and conclusions of the Department. The testimony given before the Department tends to show that a large amount of the freight handled by the auto transportation company over the proposed route will be farm produce, and it is argued that, because the Auto Transportation Act by its terms provides that " 'auto transportation company' as used in this act, shall not include . . . motor propelled vehicles, operated exclusively in transporting agricultural, horticultural, or dairy or other farm products from the point of production to the market" (Laws 1921, p. 338, § 1[d]), that these items should have been excluded, and that a certificate should not have issued based in part upon the convenience that would necessarily be attendant upon the transportation of these commodities. We cannot so construe the statute. There are undoubtedly many communities in this state producing abundantly farm produce which cannot be profitably transported to markets unless the transportation company is also permitted to haul other freight on its return trip. We think that it was the intention of the legislature in passing the act to permit the Commission to consider in its entirety the needs of the locality to be served and to include farm produce as well as all other kinds of freight in arriving at its decision.

[3] Appellants also complain that the evidence taken as a whole is not sufficient to justify the findings, and this court is asked to try the case *de novo*. In the case of Pacific Coast Elevator Co. v. Department of Public Works, 130 Wash. 620, P.U.R.1925B, 618, 620, 228 Pac. 1022, we said:

"The findings and conclusions of the Commission as to the facts are invested with the presumption of verity and no court would undertake to disturb them in this case. Respect is accorded to the judgment of those in whom the people by their own plan have placed it."

See, also, Northern P. R. Co. v. Department of Public Works, — Wash. —, P.U.R.1927D, 788, 256 Pac. 333.

We hold that this court will not substitute its judgment for the judgment of the Commission, that every presumption will be given to the correctness of the findings of fact made by the Commission, and, if there is substantial evidence on which the findings of the Commission may be based, that those findings will not be disturbed. Measured by this rule, the judgment of the trial court was right.

Judgment affirmed.

Mackintosh, C. J., and Fullerton, Main, and Mitchell, JJ., concur.

Note.—In Northern P. R. Co. v. Department of Public Works, — Wash. —, 257 Pac. 636, June 27, 1927, the supreme court of Washington in a companion case to State ex rel. Byram v. Department of Public Works, *supra*, affirmed the judgment of the lower court on the same theory as in the case above.

COLORADO PUBLIC UTILITIES COMMISSION.

RE GIACOMELLI BROTHERS.

[Application Nos. 933, 934; Decision No. 1428.]

Appeal and review — Intervening operations relying on order later reversed.

1. A utility will not be penalized for reliance upon a former decision of the Commission, subsequently overruled, as far as intervening operations are concerned, p. 429.

P.U.R.1928A.

Monopoly and competition — Adequacy of existing service — Complaints — Busses.

2. Lack of complaints against an existing utility is reason for concluding the absence of public convenience and necessity for additional operation over the same territory, p. 429.

Monopoly and competition — Inadequacy of existing service — Illegal competition — Busses.

3. An applicant for a certificate of convenience and necessity cannot complain of the inadequate service of the holder of a certificate operating over the proposed route, where such defects in service have been caused by the ruinous and illegal competition of the applicant, p. 429.

Public utilities — Automobiles — General solicitation — Fixed termini.

4. Motor operators holding themselves out to the public at all hours to transport any and all persons between fixed stations are common carriers and susceptible to regulation prescribed for the same, p. 431.

Public utility — Automobiles — Self-appellations.

5. The question of whether one is a common carrier or not is not determined in any manner by what he calls himself, p. 433.

Public utility — Test of status — Time schedules — Automobiles.

6. Operation on regular time schedule is not necessary to invest motor car operations with the status of common carrier, p. 433.

[September 22, 1927.]

APPLICATION for certificate of convenience and necessity; refused.

Appearances: William A. Way, Silverton, for applicants; Thomas R. Woodrow, Denver, Colorado, for the Denver & Rio Grande Western Railroad Company and the Western Slope Motor Way, Inc.; Frank L. Ross, Denver, for the Silverton Northern Railroad Company, and James Pearson.

By the **Commission**: These two applications were consolidated for hearing. A joint order will be entered.

On June 27, 1927, Anthony Giacomelli and Frank Giacomelli, copartners, doing business under the firm name and style of the Giacomelli Brothers, filed their application praying for a certificate of public convenience and necessity authorizing the operation of a motor vehicle system for the transportation of passengers between Silverton, Colorado, and Eureka, Colorado, and intermediate points. On June 30, 1927, James Pearson, a certificate

holder engaged in transporting passengers between the two said points, filed his objections and protest. This case and Application No. 933 were set for hearing and heard in the Court House in Silverton, on Monday, August 8, 1927.

Evidence was given as to the financial responsibility of the applicants, the nature of their equipment, the nature of the equipment of James Pearson, the certificate holder, and other matters which for obvious reasons, we do not deem advisable to discuss at any length if at all.

Three questions arise in Application No. 934. Have applicants been operating contrary to a rule of the Commission? If so, are they excused because of reliance upon a previous decision of the Commission relating to their operations? If they are so excused, have they shown that public convenience and necessity requires their operation between Silverton and Eureka?

Rule 3 (b) adopted November 4, 1926, effective January 1, 1927, reads as follows:

"No motor vehicle carrier shall begin operation or business as such without first obtaining from the Commission a certificate of public convenience and necessity therefor."

Since January 1, the Commission has been consistently taking the position that in the case of any application filed on or after that date in which it apears that the applicant has been operating since the filing of his application, that fact alone would warrant and require the denial of his application. In this case the applicants do not claim that they were not advised as to the rule (even assuming, which we do not concede, that that would be a valid excuse) but denied that they had been operating as common carriers between the points named, and as authority cite the decision of the Commission in Case No. 281 (anno.) P.U.R.1926C, 44.

Their own evidence very strongly suggested that they had been violating this rule. Frank Giacomelli testified that they never operate except on call. However, he did say that he ran between Silverton and Eureka every day in 1926 when he was in Silverton; that they had solicited passengers to all points; that they had not failed in that year more than three times to get passengers when the Sunshine Mine was open; that most of the time this year or season he had left Silverton for Eureka at about

8:30 A. M.; that the Eureka trip constitutes the larger portion of his business. Paul Hoffman, a witness for the applicants, testified that every time he is in Eureka the applicants, or one of them, are waiting for business. He then testified that they are not there always.

James Pearson testified that the Giacomelli car leaves Silverton almost every day for Eureka between 8:15 and 8:30 A. M.; that his time for leaving is 8:30 A. M.; that the applicants go around town (Silverton) and pick up the passengers and leave just ahead of his car. He further testified that the same condition exists in the afternoon. Pearson testified also, as did the witness Wilbur Damon, that between July 20 and August 7 of this year, the applicants hauled 98 passengers between the two points named, while Pearson hauled 78.

The testimony of Wilbur Damon, a driver for Pearson, and of David McLane, formerly an employee of Pearson, showed further that almost every day the car of the applicants sits in Eureka about thirty feet from the car of Pearson waiting for passengers coming down from the mine around 9:30 in the morning and 2:30 in the afternoon (these being the hours at which the miners reach Eureka from the mine) and transports them to Silverton slightly ahead of the hour for leaving by the Pearson car.

As practically all of the operations by the applicants between Silverton and Eureka were conducted before the new law known as House Bill No. 430 became effective and, as we shall hereinafter point out, the new law is quite as wide, possibly wider, in its scope, we shall determine whether the operations of the applicants have been those of a common carrier, by reference to the terms of the act approved April 12, 1915 (C. L. 1921, § 2914). That act subjects to the laws of the state pertaining to public utilities those operations in which the operators indiscriminately accept and discharge passengers "between fixed points or over established routes." The Commission in Case No. 281, *supra,* construed the language "between fixed points or over established routes" very strictly. After the decision by our supreme court in the case of Greeley Transp. Co. v. People, 79 Colo. 307, P.U.R.1926D, 433, 245 Pac. 720, this limitation was practical-

ly eliminated by the logic of that case. As stated therein, the business defined by the statute, inclusive as well as exclusive of limitations, was that of a common carrier before the passage of the act, and the court holds that all common carriers are within the act. If the Commission had had the advantage of this case at the time that Case No. 281 was decided, it would have undoubtedly held that the applicants herein were common carriers between Silverton and Eureka. There is nothing in that act requiring that there be regular schedules.

Therefore, we conclude that the applicants were operating up tc the time of the hearing as common carriers.

[1] In spite of the fact that the Commission has heretofore overruled its decision in Case No. 281, *supra,* we are constrained to and do hold in this case, in view of that decision affecting and sanctioning the operations of the applicants, that the applicants should not be penalized for acting in reliance upon the decision, and for operating up until the date of the hearing.

[2, 3] However, the Commission is of the opinion, and so finds, that there has been no proof of public convenience and necessity for the operation of the applicants between Silverton and Eureka. One reason for such conclusion is that there have been no complaints made to the Commission against the equipment and service of Pearson. Another is that Pearson has not had an opportunity to enjoy the benefit of his certificate, because of the very disastrous competition of the applicants.

There was considerable testimony as to the unsatisfactory condition of the equipment of Pearson. If Pearson had been running without the unlawful and highly injurious competition of the applicants this testimony would have considerably more weight. We might add also that no complaint has been filed with the Commission against the service rendered by Pearson. If the applicants were of the opinion that the equipment and service of Pearson are not adequate they should have refrained from engaging in an unlawful operation until such time as their application could be heard and determined. While the case of Richardson v. McKelverry (Cal.) P.U.R.1923B, 49, 52, was one in which a complaint had been filed against an alleged unlawful operation,

the language of the Commission applies to the situation here. It reads as follows:

"Furthermore, the contention that an existing operator, holding a certificate authorizing operation of passenger stage service over a particular route has not been rendering efficient service nor properly meeting traffic requirements in no way affects the status of defendants in this proceeding, their remedy in such case being either the filing of a formal complaint to compel the existing carrier to improve his service or the filing of an application in their own behalf for a certificate permitting them to inaugurate a service which would meet traffic requirements."

It is not surprising that the evidence shows that Pearson, the certificate holder, in the year 1926 earned a profit of only $156, and that during 1927 up to the time of the hearing he had lost $6.50 without including depreciation on his equipment.

On June 27, 1927, the applicants, as copartners, filed their application praying that in the event that Commission finds that the nature of their business is such as to constitute them common carriers a certificate of public convenience and necessity be issued authorizing the operation by them of a motor vehicle system for the transportation of passengers between Silverton, Colorado, the town of Eureka, the city of Ouray, the city of Durango, and other points.

This case was set for hearing and heard in the court house in the town of Silverton on Monday, August 8, 1927, and then and there consolidated for hearing with Application No. 934.

It appeared when the case, Application No. 933, was called, that no notice of the filing of said application and of the setting of said case had been given to James Pearson, the Silverton Northern Railroad Company, the Denver & Rio Grande Western Railroad Company, and the Western Slope Motor Way, Inc., with which parties the applicants might possibly compete. They, therefore, made their oral objections and protests and took part in the hearing in opposition to the granting of the application.

The attorney for the applicants very clearly took the position that the nature of the service desired to be rendered by the applicants is such that they would not be common carriers and that,

therefore, they do not need and the Commission should not issue, a certificate of public convenience and necessity. This position has been further taken in a written brief filed by him. The position of counsel for applicants was taken with such earnestness and sincerity that we have most carefully considered it and the case as a whole. As we have herein stated in some detail, the applicants clearly have been operating as common carriers up to the time of the hearing, between the town of Silverton and the town of Eureka. Their operations between these towns have been designed to and have most effectively and injuriously affected the operation by James Pearson, operating between these points under a certificate of public convenience and necessity. Not only have the operations between Eureka and Silverton been those of a common carrier, but they doubtless will continue as such, even though they are termed taxi operations. Therefore, the Commission is of the opinion and so finds, that the Application No. 933 should be denied so far as it relates to the operations between Silverton and Eureka.

[4] The question then arises whether as to the other operations out of Silverton the applicants are common carriers. The evidence shows that practically all of the other operations by applicants are between Silverton and Ouray and Silverton and Durango; that the applicants hold themselves out to the public at all hours to transport any and all persons to Ouray and Durango, except that they reserve the right to refuse business under exceptional circumstances, such as unusually bad roads or weather conditions.

Some of the language of the Commission in Case No. 281, *supra,* being a complaint filed by James Pearson against the applicants herein and others, follows:

"The character of the business, so far as appears from the proof in this case, is not such as would make the defendants common carriers within the meaning of our act, there being no operation between fixed points or over established routes and is no such operation as to require the defendants to first obtain a certificate of convenience and necessity from this Commission before engaging in such business."

Since then the law relating to motor vehicle carriers, which has been in a formative and growing state, has been developed quite a little. Moreover, there is now effective a law passed during the last session of the legislature of this state [chap. 134 (d)] known as House Bill No. 430 which provides:

"The term 'motor vehicle carrier' when used in this act means and includes every corporation, person, firm, association of persons, lessee, trustee, receiver, or trustee appointed by any court, owning, controlling, operating, or managing any motor vehicle used in serving the public in the business of transporting persons or property for compensation over any public highway between fixed points or over established routes, or otherwise, who indiscriminately accept, discharge, and lay down either passengers, freight, or express, or who hold themselves out for such purpose by advertising or otherwise."

Without deciding whether the issuance of a certificate is governed by the law in effect at the time the application was filed or that in effect at the time of the hearing and now we shall consider whether it should issue under either.

As it is undoubtely true that the test for determining whether or not a given operator is a common carrier, under the statute quoted, is not whether he operates between fixed points, or over established routes, as the law now reads:

". . . between fixed points or over established routes or otherwise. . . ."

Following the term "or otherwise" the definition proceeds "who indiscriminately accept, discharge, or lay down either passengers, freight, or express *or* who hold themselves out for such purpose by advertising or *otherwise.*"

Therefore, any carrier who either indiscriminately accepts passengers or who holds himself out for such purpose either by advertising "or otherwise" is a common carrier. Whether one indiscriminately accepts passengers or holds himself out in any manner "for such purpose" is a question of fact which is determined by the facts and circumstances of his operations. One case of a private carrier operating for hire would be the carrying under private contract of a certain person or group of persons

entered into in good faith and not for the mere purpose of evading the law as has occasionally been done by common carriers in several cases, one of which was reviewed by the supreme court of Colorado in Davis v. People ex rel. Public Utilities Commission, 79 Colo. 642, P.U.R.1926E, 635, 247 Pac. 801. See also a similar case, Franchise Motor Freight Asso. v. California Shippers (Cal.) P.U.R.1925C, 382.

[5] The question whether one is a common carrier or not is not determined in any manner by what he calls himself. A common carrier being such by the facts in the case is such carrier wholly irrespective of the fact that he may call himself a private carrier. The language in the case of Richardson v. McKelverry (Cal.) P.U.R.1923B, 49, 51, is to the point:

"Terming a specific automobile service as a rent car or taxi service does not in itself make it so. It is the actual operation and the service held out by the operator to the general public which must be considered in determining whether or not operation is in violation of the provisions of the automobile stage and truck transportation act or whether it comes within the rent car or taxi cab class."

[6] It is argued also that as the applicants do not have any time schedule for arrival or departure particularly as it relates to all operations other than the Silverton-Eureka route, they are not common carriers. We find nothing in the act making the question of time schedules a test.

It is further argued that on these operations there are no fixed rates. If it be necessary, to constitute applicants common carriers, that they charge fixed rates, the evidence as to the rates shows that ordinarily when the roads are not in an unusually bad condition and the trip is taken during the daytime, the charge for transportation to Durango, irrespective of the number of passengers therein, is $30 and to Ouray $15. It appears, therefore, that their rates are, in the usual and ordinary case, fixed ones. Concerning both the effect of the absence of a time schedule and a uniform schedule of rates, we quote again from the case of Richardson v. McKelverry, *supra*:

"The Commission has further held on numerous occasions that

the fact that an operator has no established time schedule for arrival or departures, nor a published or fixed schedule of rates under which he operates, is not sufficient ground for determining that he is not engaged in the business of transportation of persons or property over a regular route or between fixed termini as defined in subsection *e* of § 1, Chap. 213, Statutes of 1917, as amended."

In the case of State v. Boyd Transfer & Storage Co. 168 Minn. 190, P.U.R.1927A, 182, 209 N. W. 872, it appears that the defendant, a transfer and storage company, was hauling household goods from Minneapolis to other points within a radius of 600 miles; that it did not operate according to schedules; that the routes and termini of its haulings were not predetermined by plan or custom; that the routes and termini were wholly subservient to occasion and constantly varying requirements. The company claimed to have reserved the right to refuse business of anyone who for any reason might be objectionable to it. It declined to send out the trucks, when, because of road or weather conditions, the business would be nonprofitable. Moreover, when its local transfer business in Minneapolis and St. Paul required the use of all of its trucks, it declined to haul any business to the points within said radius. It claimed, moreover, that it had never expressly held itself out as, and that it really was not, a common carrier. The statute in the state of Minnesota does not contain the term "or otherwise" following the language thereof "between fixed termini or over a regular route." In order, therefore, to hold that the company was operating in violation of the law, it was necessary to find first that it was a common carrier and second that it was a common carrier operating between fixed termini or over a regular route. Concerning the first question the supreme court of Minnesota said:

"On that showing (the one we have described), we assume, without deciding, that, as to its trucking of household goods from Minneapolis to other points, defendant is a common carrier." (At p. 185 of P.U.R.1927A.)

Assume that the rights of applicants are fixed by the old law,

C. L. 1921, § 2914, the routes taken by the applicants, with negligible exceptions, are from Silverton to Ouray and Silverton to Durango. Even under the law in Minnesota the operations of the applicants would be held to be "between fixed termini or over a regular route" because in that state the quoted phrase is defined by the statute to mean:

"The termini or route between or over which any auto transportation company usually or ordinarily operates any motor vehicle, even though there may be departures from said termini or route." State v. Boyd Transfer & Storage Co. *supra,* P.U.R. at p. 185.

Wholly irrespective of the fact that the applicants have been engaged in this service without a certificate, we are of the opinion, and so find, that the public convenience and necessity does not require the additional operation of the applicants. They stated at the hearing that they could not operate profitably if they were denied a certificate authorizing operations over the routes of the present certificate holders. There was little testimony concerning the necessity of authorizing an additional operator on the routes in question and that was almost wholly confined to one of the applicants.

ORDER.

It is therefore *ordered,* that the applications No. 933 and No. 934, be, and the same are hereby, denied.

ILLINOIS COMMERCE COMMISSION.

RE INDUSTRY TELEPHONE COMPANY.

[No. 17066.]

Public utility — Change of status — Mutual telephone utility.

1. A former mutual telephone company which presently serves 200 or more subscribers not stockholders was declared to be a public utility subject to Comm'ssion regulation, p. 437.

P.U.R.1928A.

Service — Telephones — Ownership of phones.

2. To conform with the policy of the State Commission forbidding the ownership and maintenance of phones by subscribers, the payment of $1.60 per annum rental for each phone was ordered where the utility, formerly a mutual company, still had all phones owned by patrons, p. 439.

Return — Amount allowed — Telephones.

3. A return of 6 per cent on the depreciated cost of the physical property of a telephone utility was approved, p. 440.

[October 5, 1927.]

APPLICATION for increased rates; increase ordered.

By the **Commission:** On January 31, 1927, the Industry Telephone Company filed with the Commission Rate Schedules Ill. C. C. 2 in which it proposed that the rates for telephone service in Industry, Littleton, and Brooklyn and vicinity be advanced and which it is further proposed that such advanced rates become effective on April 1, 1927.

It having appeared from the examination of the said schedule that a hearing should be held concerning the reasonableness of the proposed rates the Commission on February 9, 1927, suspended the said rates until June 30, 1927, and subsequently resuspended the same until December 29, 1927.

The matter was set for hearing at Springfield, Illinois, on June 23, 1927, and continued until September 7, 1927, for the purpose of permitting the engineering staff of the Commission to conduct an investigation relative to the cause.

The present and proposed rates for the principal classes of service furnished by the petitioner are as follows:

Class of Service.	No. of Stations.	Net Annual Rate Present.	Proposed.
Rural party line telephones	531	$10.00	$15.00
Town party line telephones	48	11.00	16.00
Individual line telephones	75	13.00	18.00
Business telephones	42	16.00	20.00
Business extension telephones	—	10.00	8.00

NOTE: Under the present schedule of rates subscribers are required to pay bills annually and if paid quarterly, an additional charge of 50 cents per quarter is made. Under the proposed schedule all subscribers are permitted to pay quarterly without additional charge.

At the hearing conducted in connection with the above entitled case the telephone company was represented by officials of the company and evidence was presented in justification of the pro-

posed advance in rates. It appears from the testimony offered that the Industry Telephone Company has been operating as a mutual company and that the charges to the subscribers have in the past been based upon the cost of rendering service and when it was found necessary an assessment in addition to the amount shown in the schedule of rates shown hereinabove was made in order to defray the operating expenses of the organization.

[1] According to the evidence of record the property of the petitioner was severely damaged by a sleet storm which occurred approximately a year ago and following this damage in order to repair the same the company attempted to make an assessment of $5 per subscriber. Some of the subscribers, however, refused to pay this special assessment and the company then applied to the Commission for an increase in rates. The record shows that although the company has been regarded as a strictly mutual company it has in reality been operating as a public utility and the record is clear that the Industry Telephone Company now serves and has in the past served some 200 or 300 subscribers who are not stockholders in the company and that it is, therefore, under the present law a public utility and as such is subject to the jurisdiction of this Commission.

The record also shows that the Industry Telephone Company has in the past set aside no depreciation reserve and that it has paid no dividend to its stockholders and that the financial condition of the company is such that it is unable to borrow money to finance additions to the plant or to finance the reconstruction of its property unless the notes of the company are signed personally by officials of the organization. It is the desire of the petitioner at this time to increase the rates so that the company will be placed on a self-supporting basis.

No evidence was presented by the petitioner as to the value of the property and no exhibits were presented showing the operating expense and revenue although the testimony does show in a more or less incomplete way the operating expenses and revenue. Because of the fact that so many of the items of revenue could not be given by those present at the hearing and because of the uncertainty as to the items of expense the engineering department of the Commission was instructed to make an investi-

gation and report showing the valuation of the property, the present operating expenses and revenue of the petitioner and the net income available for interest and return on investment under the present and proposed rates.

The report of the engineering section was submitted at the hearing conducted by the Commission on September 7, 1927, at which time a reproduction cost valuation of the property was presented which shows the present day reproduction cost of the property as it existed on July 1, 1927, to be $42,288. The depreciated cost of the physical property on the same date is shown by the report to be $23,978. The total operating revenue as disclosed by the report submitted by the engineers including exchange revenue, toll, and miscellaneous revenue was $8,046.66. The total operating expense including taxes and deductions from gross income but excluding depreciation was $6,484.26 leaving an amount of $1,562.34 for depreciation and return on investment under the present schedule of rates. The estimated annual accruing depreciation of the property as shown by the report submitted by the engineering staff to be 6.53 per cent of the total cost of the physical property and it is estimated by the engineering staff that the original cost of this property is approximately $30,000. This would make the amount necessary to be set aside annually for accruing depreciation in the property $1,962 which would result in a deficit under the proposed rates of $400. The application of the proposed rates as shown by the evidence submitted by the engineering staff would result in a net increase in the income of the company of $3,406 which would make the income under the proposed rates $3,006 or approximately 12.8 per cent on the depreciated cost of the physical property used and useful in furnishing the telephone service.

The Commercial Club of Industry, Illinois, was represented at the hearing but no objection was made to the proposed increase in rates. On the other hand representatives of the Commercial Club of Industry stated for the record that that organization was familiar with the situation and realized that an increase in rates was necessary for the proper operation of the telephone property and made no objection to the proposed increase. The record shows no objection to the proposed increased rates.

[2] The record shows that the Industry Telephone Company requires each subscriber to purchase the telephone instrument used by him and the subscriber is supposed to maintain the instrument although the record shows that the company in most instances locates and repairs the trouble and no charge is made the subscriber for labor, the only charge being for the material used in clearing the trouble.

In Conference Ruling No. 15, passed by the Commission on November 12, 1914, the Commission placed itself on record as being opposed to a telephone utility requiring its subscribers to own and maintain their own instruments. The ruling is in part as follows:

"The individual ownership of telephones does not meet with our approval and should be discouraged" and "The company shall furnish telephones whenever it becomes necessary to replace the telephones now owned by subscribers and in all new installations the company shall furnish all instruments."

The order further provides that the company may purchase or rent a telephone owned by the subscriber and fixes the maximum rental to be paid by the company to the subscriber at not to exceed $1.60 per annum. Payment of the rental of $1.60 per station to each subscriber and the additional expense of furnishing batteries and repairs of station equipment would reduce the return under the proposed rates to approximately one thousand four hundred dollars which is 6 per cent of the depreciated cost of the physical property used and useful in furnishing telephone service in Littleton, Industry, and Brooklyn.

The Commission having carefully considered all of the evidence of record is of the opinion and finds:

1. That the present annual operating revenue of the Industry Telephone Company is $8,046 and the present annual operating expense including taxes and other deductions from gross income and also including $1,962 for depreciation of plant and equipment is $8,446, thus resulting in a deficit of $400 per annum.

2. That the application of the proposed rates will increase the revenue by $3,406 and will result in a net income of $3,006 under the present practice of requiring the subscriber to own and maintain his telephone instrument.

3. That the Industry Telephone Company should comply with the requirements of Conference Ruling No. 15 which requires the company to furnish telephones whenever it becomes necessary to replace telephones now owned by subscribers and in all new installations the company should furnish the instruments.

4. That the company should purchase or rent telephones now in use by subscribers and should pay $1.60 per annum for each instrument now owned by the said subscribers and rented by the company.

5. That all subscribers' stations whether owned by the company or rented from the subscriber, as hereinabove provided, should be maintained by the Industry Telephone Company.

[3] 6. That the payment to the subscriber of the rental hereinafter ordered and the expense of maintaining the instruments will amount to approximately $1,600 per annum and will reduce the amount available for interest and return on investment under the proposed rates to $1,406 which is 6 per cent on the depreciated cost of the physical property.

7. That the rates proposed in Rate Schedule Ill. C. C. 2 of the Industry Telephone Company are just and reasonable rates and should be permitted to be made effective.

INDIANA PUBLIC SERVICE COMMISSION.

OLD TRAILS EXPRESS COMPANY

v.

CITY OF BRAZIL.

[No. 786-M.]

Commissions — Jurisdiction — Validity of ordinance — Load restriction on motor truck.

The Commission has no jurisdiction to pass upon the validity of a city ordinance limiting the load of any motor vehicle, truck, or trailer.

[September 30, 1927.]

COMPLAINT praying that ordinance of city limiting load of motor trucks be declared void; dismissed for lack of jurisdiction. F.U.R.1928A.

By the **Commission:** On August 22, 1927, the Old Trails Express Company, a corporation, filed with the Public Service Commission of Indiana a complaint, praying that Ordinance No. 2109 of the city of Brazil, limiting the load of any motor vehicle, truck, or trailer to 30,000 pounds, be declared void. The prayer of this complaint was predicated upon the following reasons set out in the above mentioned complaint, to wit:

"That said ordinance is unreasonable, unfair, invalid, void, and discriminatory, in this, to wit:

"(a) That said ordinance is unreasonable and unfair in that it does not take into consideration the use of more than four wheels on a vehicle and makes no provision for the use of more than four wheels on a vehicle and does not take into consideration the consequent diversion of weights and stresses by the use of more than four wheels on a vehicle. Further that said ordinance is unreasonable in that it prohibits the use of any and all streets of said city of Brazil by motor vehicles weighing more than 30,000 pounds irregardless of the number of wheels on said vehicle or the width of the tires on same.

"(b) That said ordinance of said city of Brazil is unfair and discriminatory in that it prohibits the use of said streets of said city by motor vehicles of greater weight than 30,000 pounds, and does not prohibit the operation of vehicles propelled by power other than motor power and weighing in excess of 30,000 pounds.

"(c) That said ordinance of said city of Brazil is invalid in that it conflicts with the orders heretofore made by this Honorable Commission, acting under Chap. 46, Laws of General Assembly of Indiana, year 1925, ordering and directing complainant to operate through said city of Brazil, motor vehicle units, the combined weight of which when loaded exceeds 30,000 pounds.

"(d) That said ordinance is invalid and void for the reason that it conflicts with § 51, Chap. 213, Acts of General Assembly of Indiana, for year 1925, defining and fixing the maximum weights of motor vehicles operated upon the public highways of the state of Indiana.

"(e) That said ordinance is invalid and void for the reason

that it conflicts with and interferes with the orders made by this Honorable Commission made pursuant to Chap. 46, Acts of General Assembly of Indiana, for year 1925.

"(f) That said ordinance is invalid and declared a nullity by § 4, Chap. 230, Acts of General Assembly of Indiana, for year 1927.

"(g) That said ordinance is invalid and unlawful for the reason that it conflicts with § 1, Chap. 244, Acts of General Assembly of Indiana, for year 1927, fixing and defining and prohibiting municipal corporations from regulating the use of highways within their limits.

"(h) That said ordinance is invalid for the reason that it was adopted, ordained, and approved on February 22, 1927, then a legal holiday within the state of Indiana for all purposes."

Said cause was set for hearing on September 19, 1927 at 10 A. M., rooms of the Commission, Indianapolis, Indiana, and notice of the time and place of hearing was sent to the various parties at interest.

The hearing was called at the time and place designated in the notice, the petitioner being represented by its duly appointed and authorized attorney, and the city of Brazil being represented by its assistant city attorney.

Upon the presentation of the complaint filed by the petitioner in this cause, the respondent, city of Brazil, through its representative, filed a motion to dismiss petitioner's complaint, as follows:

"Comes now the city of Brazil, Indiana, defendant in the above entitled cause, and moves this Honorable Commission to dismiss petitioner's petition herein on the following grounds and for the following reasons:

"1. This Honorable Commission has no authority to declare the ordinance of the city of Brazil, Indiana, invalid or void.

Memorandum.

"The Common Council of every city shall have power to enact ordinances for the following purposes:

"To regulate the use of streets and alleys by vehicles and to designate the kind of conveyance and vehicles that may not be

used on certain named streets that have been improved and designate hours for the use of such streets by certain specified classes of vehicles. Vol. 3, Burns 1926, § 10284, Clause 31.

"Every city and town, except when otherwise provided by law, shall have exclusive power over the streets, alleys, water-courses, etc. Vol. 3, Burns 1926, § 11186, 168 Ind. 321, 80 N. E. 961.

"The act making motor vehicle carriers public utilities, provides, 'That none of the provisions of this act shall operate to deprive the State Highway Commission of Indiana or any other public authorities, of any jurisdiction it or they now has or have or which may hereafter be conferred upon it or them over the public highways of the state, nor prevent said State Highway Commission of Indiana, or other authorities, from suspending, at any time, the right of motor busses to operate on any public highway where necessary to preserve said highway.' Acts 1925, Chap. 46, § 10, at p. 142.

"Cities and towns may make and enforce ordinances affecting motor trucks and motor driven commercial vehicles which are used within the limits of such municipal corporations and may make and enforce reasonable traffic and other regulations, except as to rates of speed, not inconsistent with this act. Acts 1927, Chap. 230, § 4, at p. 665.

"II. The petition of complainant does not show that the city of Brazil, Indiana, failed or refused, for thirty days, after being requested, by petition in writing, to grant to petitioner authority to operate its trucks over the streets of Brazil, Indiana, the gross weight of which, when loaded, exceeded 30,000 pounds.

Memorandum.

"The power of this Commission to grant permission to a public utility to operate in a city contrary to a city ordinance of such city, is given to this Commission by Chap. 76 of the Acts of 1913. Section 110 of said act provides, among other things, that: 'Whenever after a request by petition, in writing, of any public utility, the city . . . shall refuse or fail for a period of thirty days, to give or grant to such public utility permission

and authority to construct, maintain, and operate any additional construction, equipment, or facility, reasonably necessary for the transaction of the business of such public utility, and for the public convenience or interest, then such public utility may file a petition with said Commission for such right and permission.' Acts 1913, Chap. 76, § 110 at pp. 205, 206. Vol. 3 Burns 1926, § 12783.

"Wherefore this defendant, city of Brazil, Indiana, asks that said complaint be dismissed."

Under date of September 26, 1927, the Attorney General of Indiana issued an opinion in this cause, which, in part, is as follows:

"Without expressing an opinion as to the validity of the ordinance, it is my opinion that it was not the intention of the legislature that such an ordinance should be reviewable by the Commission. It is my opinion that it was not contemplated by said § 110 that traffic ordinances applicable to a general class which may include, among others, vehicles operated as public utilities should be reviewable by the Commission on complaint of a public utility affected. Such an ordinance is not regulatory of public utilities as such. I think the remedy for one who regards such ordinance void is in the courts and not before the Commission."

The Commission being fully advised in the premises is of the opinion that it does not have jurisdiction over the subject matter prayed for in petitioner's complaint, and is further of the opinion that the motion of respondent to dismiss petitioner's complaint should be upheld.

It is therefore *ordered* by the Public Service Commission of Indiana, that the complaint of the Old Trails Express Company to declare ordinance No. 2109 of the city of Brazil void, be, and it is hereby dismissed for want of jurisdiction.

It is *further ordered,* that before this order shall be effective, petitioner shall pay to the treasurer of state, through the secretary of this Commission, the sum of $6.44, expenses incurred in legal publication of notice of hearing in this cause.

INDIANA PUBLIC SERVICE COMMISSION.

RE HOME TELEPHONE COMPANY OF ELKHART COUNTY.

[No. 8760.]

Valuation — Going value — Fiscal proceeds as evidence — Telephones.

1. Operating revenues for fiscal periods were declared to have more bearing on going value than any per cent of the physical property, p. 451.

Valuation — Going value — Dividends and surplus as measures — Telephones.

2. Stock dividends and a surplus were held to express the best measure of going value, p. 451.

Valuation — Going value — Measures of — Telephones.

3. The use of property, measured by the revenue derived therefrom, expressed in dividends and surplus, determines going value rather than the value of physical property as such, p. 451.

Valuation — Measures of values — Book value — Appraisal value.

4. Book value will not provide a fair rate base where appraisal value has been injected into the entries, p. 452.

Valuation — Measures — Reproduction cost — Estimates based on erroneous assumption — Telephones.

5. Fair value is not stated by a reproduction cost estimate which assumes that the property is not in existence, as this assumption is contrary to fact, p. 452.

Valuation — Measures of value — Cost of patronage — Telephones.

6. The assumption that patronage attached must be secured at great expense was held to be, in the main, contrary to fact, p. 452.

Valuation — Measures — Erroneous assumptions — Cost new value.

7. Assumptions for purposes of attaining valuation must be based on actual historical facts, allowing for incidental or accidental economies, and not upon a theoretical basis of new cost of reproduction for every item, p. 452.

Valuation — Correction of utility estimates — Presumption by default.

8. A correction offered by the Commission engineer to a utility estimate, if unobjected to, will be accepted as well founded, p. 454.

Valuation — Depreciation reserve — Percentage reduced — Excessive balance.

9. The balance in reserve for accrued depreciation was found to be excessive and the rate for the same reduced to 3 per cent per annum on the cost of depreciable property in service, p. 454.

Commission — Power to compel production of data — Refusal to produce.

10. A reference was noted to advise the management of a utility

which had refused to produce certain invoices requested by the Commission engineer that the law requires all information in possession of a public utility to be furnished to the Commission within the scope of its lawful operation, p. 454.

Return — Operating expenses — Officer's compensation — Telephone.

11. A telephone utility was ordered not to charge to operating expenses a sum greater than $50 a month as compensation for service rendered as member of the executive committee attached to company's organization, p. 455.

[September 2, 1927.]

PETITION of a telephone utility for increased rates, tolls, and charges at certain exchanges; increase ordered.

Appearances: V. G. Cawley, Elkhart, L. L. Burris, Goshen, for petitioner; E. J. Simpson, City Attorney, Goshen, W. E. Wider, City Attorney, Elkhart, Edward O. Fifer, City Controller, Elkhart, for protestants.

Singleton, Chairman: The original petition in the above entitled cause was filed November 22, 1926. The amended petition was filed January 24, 1927. Another amended petition was filed January 31, 1927.

Hearing on the original petition was set for December 28, 1926, at Goshen, Indiana. At that time petitioner discovered that a fair return upon invested capital was asked rather than a fair return upon the fair value of the property. Upon this discovery petitioner requested postponement of hearing in order to amend petition, praying for a fair return on the fair value, and said request for postponement was granted.

Upon completion of appraisal by engineers employed by petitioner, the city attorneys of Elkhart and Goshen asked for delay in hearing, in order that they might be better prepared to offer protest against the petition. Their request was granted.

After due notice public hearing was held at Goshen, Indiana, June 28, 1927, and supplemental hearing was held in the rooms of the Commission, Capitol Building, Indianapolis, July 7, 1927. Time was given for filing of briefs. After some delay briefs were not filed, but letters stating the views of counsel were submitted in lieu thereof.

Petitioner filed formal written proof of service upon the city

authorities and chambers of commerce in both Elkhart and Goshen.

The amended petition, omitting caption and signatures, is as follows:

"Your petitioner, the Home Telephone Company of Elkhart county, respectfully represents and shows:

1. That it is a corporation duly organized and existing under and by virtue of the laws of the state of Indiana, having its principal office and place of business in the city of Goshen, Elkhart county, Indiana, and is engaged in the business of operating and maintaining a public utility by the way of telephone exchanges in the cities of Goshen and Elkhart and the town of Wakarusa in Elkhart county, and serving said cities and town and the inhabitants thereof and the communities adjacent thereto with adequate telephone service.

2. That under the provisions of the laws of the state of Indiana, it is unlawful for any public utility without the consent of your Honorable Commission to charge, demand, collect, or receive a greater or less compensation for any service performed by it within the state than the charges fixed by it in the lowest schedule of rates, tolls, and charges on file with your Honorable Commission.

3. That your petition has in effect the schedule of rates, tolls, charges, and regulations, which is herewith attached marked Exhibit A, which in the judgment of your petitioner are unjust, unreasonable, and insufficient.

4. That since the establishment of its present schedule of rates, tolls, charges, and regulations, the cost of all classes of telephone labor, materials and supplies of every kind and character used in the maintenance of a telephone system have increased in price from 50 to as much as 100 per cent. This extraordinary increase in the cost of everything necessary to the proper operation and maintenance of telephone system has imposed an unjust and unreasonable burden upon your petitioner.

5. That during the latter part of the year 1925 your petitioner had a detailed valuation made of its property used and useful for the convenience of the public by J. K. Johnston, telephone engineer, Indianapolis, Indiana. This valuation shows the re-

production cost $1,150,973. After deducting the physical depreciation of $131,830, leaves the present or sound value as of that date $1,019,143; that since the appraisal was made there has been added to the property an amount of $135,000, which amount will be detailed and filed with your Honorable Commission.

6. That your petitioner would further represent and show that its total operating and nonoperating revenue derived from its present rates, tolls, and charges are wholly inadequate and insufficient to properly operate and maintain its exchange, plants, and systems, and to take care of the maintenance and necessary depreciation and to pay a fair return upon the property dedicated to public use, which is more than one million dollars; that your petitioner has carefully calculated its increased operating and maintenance expense necessary to meet the foregoing requirements for the coming period, as well as the revenue reasonably to be anticipated from existing rates.

7. That in order to take care of the increased demand for telephone service in the city of Elkhart, your petitioner will be required to spend approximately $75,000 per year for each of the next five years.

8. Your petitioner further shows it has delivered a copy of this petition to the city clerks of the cities of Elkhart and Goshen and that their acknowledgment of the receipt of the same is annexed to this petition.

Wherefore, your petitioner prays that your Honorable Commission will establish such rates for its service as will enable it to meet said maintenance and improvement expense and yield a fair return upon the fair value of its property used and useful, as shown by an appraisal thereof by it taken as of the first day of November, 1925, and a certain subsequent appraisal by it taken as of November 30, 1926, copies of which former appraisal are on file with your Honorable Commission, have been heretofore filed in cause No. 8534 and copies of which latter appraisal are filed herewith in duplicate. And the petitioner prays for all other proper relief."

For the petitioner, J. K. Johnston, consulting telephone engineer, Indianapolis, Indiana, and Fred E. Swaim, public utility

accountant, Huntington, Indiana, were the principal witnesses as to appraisals and audits to develop the facts from the experience of petitioner.

Many written exhibits were filed, among which were an appraisal by Mr. Johnston as of December, 1925, an additional appraisal as of December, 1926, additions and betterments made to the plant from January 1 to May 31, 1927, and an estimate of the requirements that will be made upon petitioner to meet the demands of its business, especially in Elkhart, Indiana, for the five years beginning January 1, 1927.

Many exhibits were filed by Mr. Swaim setting out the accounting features of the company's business and the needs of the company as shown thereby.

Appraisals made by the engineering department of the Public Service Commission were filed as exhibits and testimony was heard in support of said appraisals.

Audits made by the accounting department of the Public Service Commission were filed as exhibits and made a part of the evidence. Other exhibits were filed by petitioner tending to show the needs of the property during the coming five years and among these were maps of the city of Elkhart. In this city the growth is rapid and the demand for extensions to the physical property urgent.

The evidence showed that certain sums of money had been transferred from the reserve for accrued depreciation to the surplus account in the accounts of both the Elkhart and Goshen plants also that prior to 1917 dividends had not been paid, although that fact was not admitted in evidence as a reason for even suggesting that deficits of the past could be made up by rates and charges applicable to future operation.

Written exhibits were also introduced showing comparisons of the appraisals made by Mr. Johnston and by the Commission's engineering department, and showing the classes of property in which these appraisals did not agree.

All evidence introduced, both oral and written, has been considered carefully and has been given due weight in reaching conclusions.

Petitioner's offer to introduce evidence showing estimated re-

quirements for extensions and betterments that will be made upon these plants during the coming five years was objected to by counsel for protestants. The Commission believes that matters of this kind should not be given major consideration in advance of their accomplishment. The rates for service should not provide funds for capital investment. The utility has its method according to law to meet such conditions at any time when they arise and in a proceeding separate from a rate case. Therefore, the Commission holds that this offer is not proper evidence to consider in determining rates in the instant case.

Evidences of Value.

Physical Property and Overhead Charges.

	Elkhart Exchange.		Goshen Exchange.	
	Cost Reproduction.	Present Worth.	Cost Reproduction.	Present Worth.
Appraisal by J. K. Johnston:				
Physical property	$903,542	$788,907	$280,943	$243,916
Plus 15% overheads	135,531	118,336	42,141	36,587
Johnston's total	$1,039,073	$907,243	$323,084	$280,503
By Commission's Engineers:				
Physical property	$766,716	$629,375	$295,212	$242,973
Plus 15% overheads	111,472	90,890	43,004	35,443
Total reproduction	$878,188	$720,265	$338,216	$278,416

Estimated original cost by Commission's engineers:

	Elkhart.	Goshen.	Both Exchanges.
Physical property	$659,052	$266,501	$925,553
Plus 12% overheads	76,258	30.958	107,216
Totals	$735,310	$297,459	$1,032,769
Plant Additions Shown by Commission's Audit—Period Included December 31, 1926:	$600,426.03	$240,523.16	$840,949.19
By Fred E. Swaim—April 30, 1927:	$614,224.55	$243,100.82	$857,325.37

November 30, 1919, an appraisal of these properties was made by the Public Service Commission engineers. During the year 1921 the excess (in dollars) of this appraisal over the historic cost, as shown by the company's books, was added to the book entries. These entries increased the amounts shown on the books as historic cost by the following sums:

Elkhart plant	$172,755.09
Goshen plant	70,147.44
Total	$242,902.53

These entries destroy the truth of historic cost statements, which the books of the utility are intended to show and should show. The books of the company should be so corrected, and it will be so required.

Valuation for taxing purposes in 1927 by the State Tax Commission was $553,410 for the exchanges at Elkhart, Goshen, Wakarusa, and Middlebury, plus $84,800 in real estate, etc., that is assessed locally for taxes; total tax valuation, $638,210 in the four communities. Only Elkhart and Goshen exchanges are involved in this cause.

Such taxes are allocated to various plants on the basis of book values. In 1926 taxes assignable to operations were charged as follows: Elkhart, $16,725.91; Goshen, $6,675.26; Wakarusa, $1,034.25; total, $24,435.42. Therefore, Elkhart exchange paid approximately two-thirds of total taxes paid, while Goshen exchange paid more than one-fourth of the total.

Therefore, it would seem fair to assume that the tax value upon the entire properties referred to in the preceding paragraph should be allocated in corresponding ratio. This would mean that Elkhart plant is valued for taxes at approximately $434,000; Goshen plant, approximately $173,000.

Evidence of Going Value

[1, 2] The operating revenues for 1926 in Elkhart amounted to $183,689.88; in Goshen, $71,366.33. These results have more bearing on going value that should and does attach to the property than any per cent of the physical property. From these revenues a dividend of 10 per cent was paid on the common stock and a dividend of 6 per cent on the preferred stock. The dividend and surplus express the best measure of going value. The law does not permit the Commission to accept stocks outstanding as expressing fair value of the property.

The fact that 7538 patrons use the service in Elkhart and 2654 use it in Goshen is substantial evidence of going value.

Toll revenues of $12,810.26 in Elkhart and $13,399.64 in Goshen in 1926 speak well for the use of the service. Such is evidence of going value.

[3] "The value of the physical property, as such, is in no

respect evidence of going value. The use of that property, measured by the revenue derived therefrom, expressed in dividends declared and surplus accumulated tell a definite story of going value."

The fact that the net income per station in 1926 was $5.58 and $5.98 in Goshen is specific proof that the property has earned and established a going concern value. The fact that the physical property has cost a certain sum of dollars proves nothing except the cost.

Fair Value and Assumptions.

The Commission is required by law to authorize a schedule of rates and charges for service that will give the utility a fair return on the fair value of the property used and useful in the public service. The principal question, therefore, is to determine fair value.

[**4**] It would not be fair to provide a return on the basis of book value, because it has been shown above that the present books do not state the book value—historic cost. On the contrary, the books now show an appraisal value, plus net additions and betterments, since said appraisal value was forced into the book entries.

[**5**] The Commission does not believe that cost of reproduction new depreciated, plus an arbitrary allowance of 10 per cent of the physical property for going value, plus allowance for working capital states fair value, because such appraisals by utility engineers usually include many assumptions that do intolerable violence to the facts.

The assumption that the property is not in existence is contrary to fact.

[**6**] The assumption that patronage now attached to the property must be secured at great expense is, in the main, contrary to fact. The patrons are present, in the major part, when the property is built, seeking the service. Otherwise, capital would not seek the investment.

[**7**] The assumption that poles, wire, cross arms, cable, telephone instruments, etc., are not in existence and must be bought new is contrary to fact.

The assumption that buildings must be constructed new, on a theoretical basis, is contrary to fact. The buildings are there. Some buildings have been built and some buildings have been purchased. The facts in these instances are evidences of present value: For example, the exchange building at Goshen was purchased for a sum much less than it is worth to the petitioner. That fact should be considered, though it should not control. Why assume that this building is not there and estimate the cost of constructing it at the greatest possible expense when we know how it was acquired and, upon that basis, can appreciate it to a present, fair value?

It is not fair to require the patron to pay a return on the estimated cost of attaching the business, without giving credit for the amount of business that was waiting for the service. Utility engineers do not submit such estimates in favor of the patron.

Mr. Johnston, appraisal engineer for petitioner, stated in his report:

"It is the problem of an engineer to ascertain what amount of money would constitute a full and perfect equivalent of the property *which the company is using in the service of the public.*"

Again he states:

"An appraisal engineer, in valuing the property of a utility, first determines what it would cost to reproduce a property, substantially like the existing plant. If the old plant was wiped out, what would it cost to construct a plant *capable of performing the same service* as now performed by the old plant."

These statements are sound and reasonable.

To secure an "equivalent of the property which the company is using" does not render it necessary to buy everything new, because a large part of the property that "the company is using" is not new.

To secure "a plant capable of performing the same service as now" does not make it necessary to buy everything new and build everything new.

In other words, cost of reproduction is one evidence of value. Reproduction of these properties would be the result of proceeding according to Mr. Johnston's statements reproduced above. That would not mean to produce the plants new and depreciate

to the condition of the existing property, but should mean to reproduce the plants that have been actually constructed and depreciate that property to exact conditions found at time of appraisal.

[8] During the hearing Mr. Hutchinson, of the Commission's engineering staff, directed attention to one error in Mr. Johnston's appraisal. A statement of this, in detail, was produced and furnished Mr. Johnston. Nothing has been heard from him, therefore, the Commission accepts the correction offered by Mr. Hutchinson as being well founded. The error amounted to $4,388 in the Elkhart exchange and $1,882 in the Goshen exchange, causing the appraisal to be too high by such sums.

The tendency of the company's engineer is to reach high labor costs in estimating cost of reproduction. The Commission's engineers tend to run higher in prices of items of the physical property. Being estimates in both instances, the Commission must reach a judgment that will appear to be equitable.

Depreciation Reserve

[9, 10] The balance in reserve for accrued depreciation December 31, 1926, was $153,996.14. On January 1, 1920, this balance was $156,494.75. In 1921 more than $95,000 was debited to this reserve in the adjustment of the books to appraisal made in 1920. The present balance would be more by that amount if the debit had not been entered. Accruals for this reserve continued regularly each year.

Such part of this balance as is not in the depreciation reserve cash fund finds its way into the property as a substitute for capital investment by the owners. To this extent those who pay the rates have built a part of the property, because this balance is accumulated by charging against operating expense.

This is unfair to the rate payers.

The balance in this reserve is too large. The rate for accrual of this reserve has been excessive, should be reduced, and it will be so ordered.

Petitioner's Unwillingness

The testimony disclosed that the manager of the company

declined to exhibit to the Commission's engineers certain invoices requested by them, stating that he believed the matters so furnished would be used against the petitioner. Such conduct is a failure to be frank and fair with the public, which the manager of any public utility should strive to do. The law requires all information in possession of a public utility to be furnished to representatives of the Commission for the purpose of preventing the practice of deception against the public interest. This reference is intended to advise the management of this utility to discontinue such effort.

Having considered all of the evidence and being thereby duly advised, the Commission finds:

1. The fair value of the Goshen exchange, including going value and working capital, is $292,669.

2. Fair value of the Elkhart exchange, including going value and working capital, is $790,737.

3. Fair value of the two telephone properties at the time of investigation is, including going value and working capital, $1,083,406.

4. Rate for depreciation reserve account should be not more than 3 per cent per annum on the cost of depreciable property in service.

[11] 5. Not to exceed $50 per month should be charged to operating expense as compensation for service rendered as member of the executive committee attached to the company's organization.

6. That the schedule of rates and charges set out below are and will be adequate to provide a fair return on the fair value of the property, used and useful in the public service.

7. That the value of the depreciable property, as of December 31, 1926, of the Elkhart plant was $600,500; of the Goshen plant, $241,000—less cost of lands in each instance.

8. That the adjustment of the books to include an appraisal and valuation of the property with the records of the historic cost of the property, thereby destroying the identity of the record of historic cost, is unfair to the public and should not be practiced.

It is therefore *ordered* by the Public Service Commission of

Indiana that the schedules of rates and charges by the Home Telephone Company of Elkhart county, Indiana, shall be as set out above in each exchange and shall be made effective October 1, 1927; that said schedules are by reference hereby made a part of this order as if reproduced herein.

It is *further ordered* that the above rates and charges shall be net and that a collection charge of 25 cents per station shall be added in all cases in which patrons do not pay for the service within the prompt payment period provided by the rules of the company.

It is *further ordered* that the rate charged for accumulation of reserve for accrued depreciation shall not exceed 3 per cent per annum on all depreciable property used and useful in the public service.

It is *further ordered* that the company shall discontinue the practice of charging to operating expenses in excess of $50 per month as compensation for a member of the executive committee.

It is *further ordered* that the fair value of the property be and the same is hereby found to be for the Goshen exchange $292,-669; for the Elkhart exchange, $790,737—said value to include going value and working capital in each instance.

It is *further ordered* that the petitioner shall pay to the state of Indiana, through the secretary of this Commission, as expense for audits and appraisals made by the departments of this Commission, the sum of $1,220.67, chargeable to the Elkhart exchange, and the sum of $467.70, chargeable to the Goshen exchange—total, $1,688.37—and that this order shall not become effective until said charges shall have been paid; also, that these charges may be amortized by each exchange over a period of four years.

Harmon, Ellis, concur; McCardle, McIntosh, absent.

P.U.R.1928A.

MONTANA BOARD OF RAILROAD COMMISSIONERS.

COUNTY COMMISSIONERS OF FLATHEAD COUNTY.

v.

GREAT NORTHERN RAILWAY COMPANY.

[Docket No. 968, Report & Order No. 1485.]

Crossings — Establishment — Railroad yards — Danger.

1. There should be no delay in constructing an overhead or subway crossing at a railroad yard pending changes in the yard although for a number of years a large number of persons may have developed a sense of rail traffic and knowledge of the best means of making the perilous journey over or under cars, p. 460.

Crossings — Commission jurisdiction — Type of construction.

2. The Commission has no authority to order the construction of a particular type of crossing beyond exercising the statutory authority in determining whether or not it shall be a subway or an overhead crossing, p. 462.

Crossings — Overhead or subway.

3. An overhead crossing was considered preferable to a subway on the ground that a subway is not always a safe place and is frequently resorted to by questionable characters for unlawful purposes, p. 462.

Crossings — Viaduct — Division of cost.

4. A railroad company which is primarily responsible for a dangerous condition at a railroad yard where persons have crossed over and under the cars apparently without protest by the company should bear the greater portion of the expense necessary to eliminate the condition by constructing an overhead crossing, p. 462.

[May 21, 1927.]

En banc. APPLICATION for an order requiring the construction of an overhead or underground crossing; granted.

Appearances: E. M. Child, County Attorney, for petitioner; Walchli & Korn for the protestant, Great Northern Railway Company; J. D. Neville and A. L. Hughes for the city of Whitefish, for the Kiwanis Club of Whitefish and for the residents of Five Acre Tracts; Sidney M. Logan for the residents of Five Acre Tracts; E. G. Toomey for the Board.

By the **Board:** In Great Northern R. Co. v. Board of County Commissioners, 13 M. U. R. 49, P.U.R.1920D, 828, this tribunal was first made acquainted with the subject of the instant proceeding—that is a safe crossing for pedestrians and others

through the yards of the Great Northern Railway Company at Whitefish, Montana. A misapprehension as to the statutory method for invoking the action of this Board resulted in the former proceedings coming to naught. The instant proceeding was rightly commenced and correctly prosecuted by petition of the Board of County Commissioners of Flathead county and we are now asked to exercise the authority contained in Chap. 148, Laws 1919 (§§ 6625–6636, Revised Codes of Montana 1921) by ordering the Great Northern Railway Company to construct and maintain an overhead or an underground crossing for the use and convenience of the general public, and particularly for the use and protection of residents of the city of Whitefish and others.

From the record the following facts appear: The principal portion of the city of Whitefish, an incorporated municipality, including all of the business district, the high school, the seventh and eighth grade schools, churches and all places of amusement and entertainment lies within the original townsite of the city south of the Great Northern Railway Company's right-of-way and tracks and east and west on either side of Central avenue in Whitefish. On the North side of the railway company's right-of-way and tracks there is an unincorporated community known as Five Acre Tracts. This area is not a part of the city of Whitefish. To the west of this area, and also north of the tracks and right-of-way, is the so-called side portion of the city of Whitefish, comprising Ward No. 1 of the municipality. The railway company's right-of-way definitely separates the north from the south sections of the city, and, in fact, physically divides it as effectually as if there were two separate cities.

A census shows that there are 185 adults and about 194 minors residing north of the tracks in the first ward of the city and on the Five Acre Tracts. Of these minors 62 attend school on the south side of the tracks. These school children and the adults, who have occasion to visit the business and principal residential section of the city of Whitefish, for either business or social reasons, have for many years been in the habit, and now persist in the habit, of crossing the right-of-way and tracks of the Great Northern Railway at a point which, in a general way, bisects the

divisional yards at that point. Their accustomed path of travel is over and across more than twelve parallel tracks, and it is a daily occurrence for scores of such minors and adults to crawl over and under trains and cars at the imminent risk of life and limb. It is estimated, and we think conservatively, that the divisional yards are crossed on a line which would be a projection of Central avenue, in a northerly direction not less than 350 times each day by pedestrians traveling between the city of Whitefish, proper, and the first ward and Five Acre Tracts north of the tracks. Personal observation, made by members of this Board following the hearing, showed that between 3:30 and 5 o'clock P. M. on April 6, 1927, 32 adults and 21 children crossed the twelve tracks in the yards near Central avenue—all except four of whom were traveling from south to north. Seven adults were carrying packages and hand luggage and two others carried infants in arms. All of these persons either passed around the ends of cars or trains, moving or standing, or crawled under box cars or over couplings.

The reason for this extraordinary condition of affairs is found in the fact that the only highways or thoroughfares, public or private, connecting the areas north and south of the tracks consist of (1) a public highway at the extreme west end of the Great Northern yards—which runs west from the center of the city and then passes in a northerly direction under the Great Northern Railway Company's bridge and thence runs eastward to Lakeside or Ward No. 1 and the Five Acre Tracts. The use of this road requires travel for a distance of about one and one-half miles to reach the Five Acre Tracts from the main business section of the city of Whitefish and travel of about one mile to reach the first ward. (2) There is a grade crossing near the eastern end of the yard—travel upon which, between the indicated termini, is for longer distance. The testimony shows that there is no fence or other obstruction at either the northern or southern junctions of the yards to prohibit crossing the yards, and it is a fair inference from the present record that no fence or obstruction was ever erected. The common habit of crossing the yards is so well established that employees operating in the

yards have become accustomed thereto and as a result developed a high degree of caution.

It seems almost incredible that such a condition as we have described would be permitted to exist. While pedestrians cross the yard on foot paths at various points, the principal flow of traffic is over a line which would in reality be a projection of Central avenue or Baker or Lupfer avenues. At any of these points, which may be selected for crossing, twelve or more tracks are constantly traversed by switch engines engaged in classifying freight trains and uncontrolled moving box or freight cars kicked or shunted in switching operations. At more or less fixed times by through and local passenger trains utilize one of the sets of tracks, and through and local freight trains pass through the yards or are assembled therein several times a day.

[1] The Great Northern Railway Company frankly recognizes that a continuance of the situation is intolerable—not only from a public standpoint but from the standpoint of its own operations. Some of its representatives make the suggestion, of record, that relief in the form of a subway or an overhead crossing be postponed until a contemplated yard change is perfected. By this change the tracks in the west end of the yard would be diminished in number opposite Baker or Lupfer avenues resulting in more simple construction of either of the types of proposed crossings. The company's witnesses, however, testify that there will be no change in 1927. We do not believe that the counsel of delay should be listened to. Already two or more adults have been seriously injured in making one of these customary crossings, and a young girl was killed within the past six months, while in the act of crossing the yards near Central avenue. Undoubtedly residents on both sides of the tracks from long familiarity with the yards, have developed a sense of rail traffic and knowledge of the best means to make the perilous journey over or under cars, but this is not an argument for encouraging any more risks.

The Great Northern Railway Company invites proposals made for eliminating the existing danger and seeks the co-operation of complainant in a division of the cost. A grade crossing, even with the protection of automatic gates and flagmen is out of the

question from the standpoint of the safety of the public and convenience of yard operations. The alternative is either a subway or an overhead bridge of some type.

The district engineer of the Great Northern made an estimate of the cost of construction of a vehicle subway across the yards at Whitefish and his figures total $80,000 for permanent standard installation. This figure is based on a subway at the intersection of Baker avenue where provision must be made for maintaining some thirteen tracks. At Lupfer avenue where there are now only five tracks the engineer estimates that the cost would be 5/13 of the former figure "or around $33,000." For a permanent pedestrian subway 8 feet wide and 8 feet high the same witness figures the cost at $28,600. An overhead pedestrian crossing of the cheapest construction (timber, susceptible to fire) would cost $19,500, without allowing anything for loss of the use of ground by reason of the construction. The witness cites cases where the railway company has undertaken the similar construction in co-operation with public authorities on a division of cost, usually 50 per cent to the railway company and 50 per cent to the state or county, though in some instances the Federal Government has borne as much as 75 per cent of the cost incident to highway construction, changes, or separation of grades. It is said by this witness that the erection of a vehicle or pedestrian overhead bridge would seriously impede the utility of the yard because of the necessity of locating permanent piers between tracks, and consequent loss of vision and increased danger due to a narrowing of the operating area between the piers. While these hazards are to be avoided, they are avoided by suitable construction in many yards with more tracks than at Whitefish.

Petitioner's engineer, a man of wide experience and one whose work has many times been exhibited to this Board, agrees, substantially, with the district engineer as to the cost of a pedestrian subway. He offers as an alternative to the railway company's proposals, construction of a suspension bridge over the yard. He estimates that such an installation could be effected at less cost than any subway, and since it would hang from piers placed at either side of the yard there would be no interference with

operation. Its sides and top would, of course, be covered with a heavy steel netting to protect persons of all ages in crossing.

[2–4] We do not conceive it to be within our province to order the construction of a particular type of crossing beyond exercising the statutory authority in determining whether or not it shall be a subway or an overhead crossing. We are convinced that an overhead crossing is preferable, not only because it would cost less than an overhead structure, but because a subway is not always a safe place and is frequently resorted to by questionable characters for unlawful purposes. There is a legal limitation on the right of the county to participate in the cost. Its officers may not appropriate more than $10,000 to the project without submitting the matter to an election. We believe that the exigencies of the situation demand that work be commenced and prosecuted without the delay incident to the calling and holding of a special election. Moreover, the Great Northern Railway Company is primarily responsible for the condition which exists. Years ago it might have prevented the condition, but instead of doing so it has, by an obvious course of conduct, permitted the public to use its right-of-way as a highway. If it ever protested against such use, we have not been furnished with any evidence thereof. Under the circumstances it ought to bear the greater portion of the expense necessary to eliminate the condition. An appropriate order will be entered.

ORDER.

At a session of the Board of Railroad Commissioners of the state of Montana held in its office in the Capitol Building at Helena, Montana, on Saturday the 21st day of May, 1927, present Chairman Boyle and Commissioners Young and Dennis, there regularly came before the Board for final and appropriate action the petition of the Board of County Commissioners of Flathead county for an order directing the Great Northern Railway Company to construct and maintain an overhead crossing at Whitefish, Montana, Docket No. 968, and it appearing that a full investigation of all matters and things involved has been had, including public hearing whereat all persons interested ap-

peared or had opportunity to appear, and now the Board being fully advised in the premises.

It is *therefore ordered* that the Great Northern Railway Company shall, not later than July 1, 1927, commence and prosecute diligently to completion the construction and installation of an overhead bridge (pier or suspension, at its option), suitable for pedestrian traffic at the intersection of the Great Northern right-of-way and Baker avenue in Whitefish, Montana, said bridge to extend across the yards and right-of-way of the Great Northern Railway Company on what would be a projection of said Baker avenue across said right-of-way; and that the same shall be so constructed as to furnish safe and ample means of crossing all the trackage on the right-of-way for persons passing from Whitefish, or points adjacent thereto, to the Five Acre Tracts, or points adjacent thereto or vice versa.

It is *further ordered* that in the event said construction and installation shall not exceed $20,000, one-half thereof to wit: $10,000 shall be borne and discharged by the said Great Northern Railway Company and the remaining one-half thereof, to wit: $10,000, shall be borne and discharged by the county of Flathead, state of Montana. In the event such construction and installation shall cost in excess of $20,000 the said county of Flathead, state of Montana, shall bear and discharge $10,000 thereof and said Great Northern Railway Company all of the remainder.

It is *further ordered,* that said county of Flathead and the Great Northern Railway Company, through their proper officers, shall submit to this Board a joint plan for carrying this order into effect on or before June 20, 1927.

Jurisdiction of this case is hereby retained for the purpose of securing the execution of this order and all the incidents thereof.

It is *further ordered,* that this order shall be in full force and effect forthwith according to its terms.

It is *further ordered* that the secretary shall serve a true copy of this report and order upon each of the parties hereto, and that the same shall be in full force and effect forthwith according to its terms.

NEW JERSEY BOARD OF PUBLIC UTILITY COMMISSIONERS.

BOROUGH OF LEONIA

v.

NEW JERSEY & HUDSON RIVER RAILWAY & FERRY COMPANY et al.

Street railways — Paving of track surface — Damage by cars.

1. Where a former ordinance (No. 32, March 4, 1903) providing for the entire maintenance of paving between and outside of the track of a street railway company to the distance of 2 feet, by the utility, has been modified by an act (Chap. 129, N. J. Laws, 1927) providing that the paving between and outside of the track to a distance of 18 inches shall be repaired by the utility for any "damage by reason of the operation of street railway cars over such tracks," the paving liability of the company that can be enforced by the Board is limited to only such damage as is caused by such operation, whether before or since the passage of the act and to such area as is specified by it, p. 466.

Street railways — Paving of track surface — Cause of damage.

2. The presence of railway track ties in a street is not the proximate cause of damage to the pavement and to the shifting of the ties so as to make the railway company liable for cost of repaving under a law limiting liability to such damage as is caused by street car operation, where the shifting of the ties was due to disintegration of the pavement by reason of other traffic and the elements, p. 468.

Commissions — Power to enforce terms of ordinance — Track paving — Street railway.

3. The Commission has no jurisdiction concerning the enforcement of the provisions of an ordinance requiring a traction company to make repairs to pavement in accordance with the terms thereof, p. 468.

Street railways — Track paving — Damage caused by other traffic.

4. Testimony having clearly indicated that damage to pavement was but partly due to the operation of street cars and the testimony of the proportion of damage due to other causes being indefinite, no order concerning the apportioning of the cost of repaving between the borough and the utility will be made until subsequent proceedings reasonably establish the ratio of liability, p. 469.

[November 1, 1927.]

PETITION of borough to have area of certain tracks repaved; dismissed without prejudice to future hearing.

Appearances: J. B. Leslie for the petitioner; C. S. Straw and George H. Blake for the respondent.

By the **Board**: This is an application by the borough of Leonia for an order of the Board to require the New Jersey &

Hudson River Railway & Ferry Company and the Public Service Railway Company to restore the pavement between and adjacent to the tracks of said companies on Broad avenue in the borough of Leonia, New Jersey, which pavement it is claimed has been damaged by reason of the operation of street railway cars over such tracks by said companies.

Chapter 129, New Jersey Laws of 1927, approved March 23, 1927, and effective immediately, provides, in part, as follows:

". . . Whenever any part of the pavement between the tracks and 18 inches outside thereof on any street, road, or highway upon which is located the tracks of any street railway company or traction company has heretofore been or shall hereafter be damaged by reason of the operation of the street railway cars over such tracks and such company at the time of the passage of this act is obligated to repair such damage and fails to repair the same, any state board or any political subdivision of the state having control of any such street, road, or highway may apply to the Board of Public Utility Commissioners for an order directing said company to repair the said pavement to the extent that it may have been damaged as aforesaid, which Board is hereby given jurisdiction to hear and determine the matter and to make such order in accordance herewith as in its judgment may be just and reasonable. . . ."

Testimony was submitted by the petitioner to the effect that the pavement between and adjacent to the tracks of the New Jersey & Hudson River Railway & Ferry Company and the Public Service Railway Company on Broad avenue, in Leonia, is in a bad condition of repair. It appears that on the greater portion of Broad avenue in the borough of Leonia, that is, between the locality known as Christie Heights and the south city line of Leonia, the pavement is macadam, treated with Tarvia; that between Christie Heights and the northern boundary of the borough of Leonia the pavement is water-bound macadam. The testimony submitted by the petitioner was to the effect that the damage to the pavement between Christie Heights and the south city line between the rails and immediately outside thereof was occasioned largely through the operation of the cars. It was claimed that the vibration of the rails, together with the move-

ment of the ties on which the rails are laid, caused disintegration of the pavement, which, upon being loosened was further damaged by vehicular travel. It was admitted, however, that a portion of the damage to the pavement was occasioned primarily by vehicular travel and by the action of the elements, particularly during recent heavy storms.

Testimony submitted by the respondent was to the effect that while there were a few localities where there was movement of the track sufficient to cause disintegration of the pavement, yet the condition of the pavement generally was not due to the operation of the cars over the track but was due primarily to vehicular travel and the action of the elements.

[1] There was submitted in evidence by the petitioner a copy of an ordinance approved March 4, 1903, known as Ordinance No. 32, and entitled:

"An ordinance granting the New Jersey & Hudson River Railway & Ferry Company, its successers and assigns, permission to construct, operate and maintain a street railway in, over, upon, and across certain streets, roads, highways, and avenues in the borough of Leonia, Bergen county, New Jersey, and Being a line of railway extending on Broad avenue from the southerly boundary line to the northerly boundary line of said borough."

Section 11 of this ordinance provides:

"The company, immediately after laying its tracks in any street, road, highway, or avenue, or part thereof, shall, at its own cost and expense, repair any and all damage done, and restore such street, road, highway, or avenue, or parts thereof, to the same, or equally good condition as before the company entered thereon, and in addition shall pave with macadam the space between, and 2 feet outside, of the rails of the westerly track of the said double track, for the distance from the southerly boundary line of the borough of Leonia to the center line of Central avenue, and shall pave with macadam the space between its rails and tracks, and 2 feet outside of its rails, for the distance from the center line of Central avenue to the northerly boundary line of the borough of Leonia. And also shall at all times hereafter repair, and keep in repair, the said paving, to the satisfaction of the council.

"Should the council at any time hereafter order or cause the part of Broad avenue affected by this ordinance to be graded or regraded, it shall be the duty of the company, to change the tracks to the new grade, at its own expense."

It will be noted that this ordinance provides that the petitioner ". . . shall pave with macadam the space between and 2 feet outside, of the rails of the westerly track of said double track, for the distance from the southerly boundary line of the borough of Leonia to the center line of Central avenue. . . ."

The act hereinbefore referred to, however, provides that the pavement between the tracks and 18 inches outside thereof shall be repaired only when same shall have been damaged by reason of the operation of street railway cars over the tracks and the company owning such tracks is obligated by an agreement to make such repairs.

The Board, therefore, is only empowered to require repairs to be made in that portion of the track area specified by the municipal ordinance within the statutory limitations.

Counsel for the petitioner contends that it was the intention of the legislature, in passing the act, N. J. Laws of 1927, Chap. 129, to preserve the paving obligations as they existed prior to the act. We cannot adopt this view. The statute provides:

"Whenever any part of the pavement between the tracks and 18 inches outside thereof on any street, road, or highway upon which is located the tracks of any street railway company or traction company has heretofore been or shall hereafter be damaged *by reason of the operation of the street railway cars over such tracks.* . . ."

It appears that the present obligation, under the statute quoted above, limits the liability of the company for repairs to such damage as is caused only by the operation of street railway cars over the tracks. This obligation exists if damage of this character was caused either before or since the passage of the Act of 1927.

The statute also provides as follows:

". . . and such company at the time of the passage of this

act is obligated to repair such damage and fails to repair the same, . . ."

[2, 3] From this it would appear that the failure to repair any other kind of damage other than that caused by the operation of street railway cars would not be an obligation of the company. According to the ordinance of the borough of Leonia, there is no qualification of the obligation to pave, maintain, and keep in repair that portion of the street within the tracks and adjacent thereto by reason of railway operation only, but the obligation is absolute. The ordinance further provides:

". . . And also shall at all times hereafter repair, and keep in repair, the said paving, to the satisfaction of the council."

This, we think, includes repairs due to the operation of street railway cars over tracks and hence we find that the company was under an obligation to repair "such damage" within the meaning of the statute at the time of the passage of the statute. The testimony indicates that the pavement between the rails and adjacent thereto is in a poor condition of repair. Between the rails in some places the ties are exposed. Adjacent to the rails and outside thereof the pavement is badly disintegrated. It is clear that the operation of street railway cars over the tracks is not responsible for the entire damage to the pavement over that portion thereof between the rails and 18 inches outside. The testimony indicates that heavy trucks and other vehicles contributed toward the disintegration of the pavement. The company's witness testified that only in a few instances was the pavement disturbed by the operation of cars, such places being at points where vibration of the rails caused the pavement to become out of repair over a distance of about a square yard from the point of the vibrating rail. The borough produced witnesses who testified concerning the condition of the pavement, their main criticism being that the pavement originally was never properly laid although they gave some testimony concerning the effect of the operation of street railway cars over the rails. Under the statute the Board is charged with the duty of fixing a fair proportion of the damage to be borne by the company due to the operation of railway cars. It has no jurisdiction concerning the enforcement of the provisions of the ordinance requiring the company

to make repairs to the pavement in accordance with the terms thereof. If the borough contends that the company has not complied with its ordinance obligation prior to the passage of this act, it may have a remedy for the company's failure to efficiently perform its obligation prior to the Act of 1927.

[4] The testimony indicates clearly that the damage to the pavement is in part due to the operation of street railway cars but with respect to the extent of the damage caused by the operation of street railway cars the testimony is so indefinite and unsatisfactory that the Board is unable to determine the extent of such damage as required by statute. The Board finds that the Public Service Railway Company is responsible to some extent for the damage done to the pavement but is unable from the record before it to fix the extent of the damage in question. The petitioner may, upon notice to the company, make further application to the Board to reopen the hearing and introduce further evidence to establish the extent of the damage to the pavement caused by the operation of the street railway cars within the meaning of the statute, and the company may at the same time, introduce evidence on its part to the same effect. No order or finding will be made requiring the company to repair said pavement and fixing the extent of the damage for which it is responsible until more satisfactory evidence to this effect is introduced before the Board.

NORTH DAKOTA BOARD OF RAILROAD COMMISSIONERS.

RE FARMERS ELEVATOR COMPANY.

[Case No. 2759.]

Valuation — Working capital — Right to allowance.

1. A reasonable allowance should be made for working cash capital in addition to the physical value of utility property in a valuation for rate making, p. 472.

Return — Reasonableness — Electric utility.

2. Seven per cent was held a fair return for an electric utility, p. 472.

Rates — Electricity — Room-rate schedule — Kilowatt hour schedule.

3. An electric company serving a village with a population of 200

was required to file a rate schedule constructed upon a kilowatt-per-month basis instead of the so-called room-rate schedule, p. 473.

Accounting — Duty to keep proper accounts.

4. A company operating a grain elevator and an electric plant should keep a system of accounts whereby the expenses of the electric utility will be shown as distinguished from the operations of the company as a whole, p. 473.

[August 2, 1927.]

PETITION by an electric utility to change rates, and for approval of certain service rules; petition refused and new schedule ordered to be submitted.

Appearances: L. S. Burgum, appearing on behalf of the Farmers Elevator Company, petitioner herein; W. S. Schure, Attorney, Fargo, appearing on behalf of the village of Arthur and inhabitants thereof.

Findings of Fact, Conclusions and Order.

Milhollan, President: On January 27, 1927 an application in the form of a petition was filed with the Commission by the Farmers Elevator Company of Arthur, North Dakota requesting an adjustment in the electric rates in that village. The Farmers Elevator Company, as the name implies, is primarily engaged in the elevator business and operates an electric utility in conjunction with the elevator. By this petition the elevator company proposes to increase certain rates and decrease others, and also seeks approval of certain service rules. The present rates on file with the Commission are shown in the following schedule: [Schedule omitted.]

A copy of the petition was served upon the officials of the village of Arthur, to which answer was made by resolution adopted by the Village Board, and by petition signed by 44 consumers of electricity at Arthur. The answer stated that the consumers were dissatisfied with the present rates and petitioned the Commission to institute an investigation for the purpose of inquiring into the reasonableness of the electric rates at Arthur.

The Commission thereupon caused its engineering and accounting divisions to make an appraisal of the property of the company and an analysis of the operating revenues and expenses.

After due notice to all interested parties was given, the matter came on for hearing at Arthur on May 17, 1927.

Evidence.

The manager of the Farmers Elevator Company, testifying in support of the application, stated that Arthur was a village with a population of approximately 200, and that this company had been furnishing electric service to the community for about ten years. It was stated that the electric utility was one of several classes of business operated by the elevator company. It appears that prior to December, 1925, electricity was generated locally at the elevator, but that on or about December 1, 1925, an electric high-line was constructed from Arthur to Amenia, a distance of about seven miles, where connection was made with the lines of the Otter Tail Power Company since which time energy has been purchased wholly from the Otter Tail Power Company and distributed by the said Farmers Elevator Company in the village of Arthur. The seven miles of transmission line referred to were constructed by the Farmers Elevator Company but the electricity is metered at Arthur. It will, therefore, be seen that line losses are borne by the Otter Tail Power Company. The Farmers Elevator Company is required to pay 6½ cents per kilowatt for electricity.

It was the testimony of the manager that the business of the company as a whole was developing a return of approximately 7 per cent, but that, in his opinion, the proposed schedule of rates would enable certain consumers to obtain a lower rate and would make the schedules uniform.

The chief engineer of the Commission introduced exhibits showing in detail the inventory and appraisal of the property on the basis of construction cost and also on reproduction cost new less depreciation. Under the construction cost method, the value of the property as of April 15, 1927, used and useful, was found to be $13,401; and as of the same date, the value under the reproduction cost, less depreciation, was found to be $13,697. From the foregoing it will be seen that there is very little difference between the value of the property under the two methods of valuation.

An exhibit showing the results of the investigation into the operating revenues and expenses for the twelve months' period, March 1926 to February 1927, was introduced by the statistician of the Commission. The operating revenues for this period were found to be $5,392.96; and the operating expenses to be $4,228.-76, exclusive of depreciation. Inasmuch as the electric utility is operated in conjunction with the elevator, most all expenses, such as labor, stationery, taxes, insurance, etc., are joint expenses in common to all the business of the Farmers Elevator Company and it was necessary to assign only a portion of the total expenses to the electric utility. Due to accounting methods adopted by the company, the apportionment of expenses between the elevator and the utility are somewhat arbitrary. However, the apportionment of expenses between the departments appears to be very reasonable. It will be noted that the net operating income available for depreciation and return for the twelve months' period was $1,164.20.

An analysis of the proposed adjustment in rates reveals the fact that decreasing the third step in the residential rates from 14 cents to 9 cents would not be effective since this analysis shows that under present conditions no consumer reaches the third step. The proposed change in the commercial lighting rate would result in an increase in revenue of approximately $60 annually based upon the experience of the company during the twelve months under consideration, but this increase, in our opinion, would result in curtailing the use of current and consequently show a diminished return.

Testimony at the hearing developed that the rates now being charged at Arthur were not greatly out of line when compared with communities of like size receiving like service.

[1, 2] The physical value of the property, as shown by the exhibits of record, is approximately $13,500. To this figure should be added a reasonable amount for working cash capital. We are of the opinion and find that the value of the electric property of the Farmers Elevator Company, used and useful in furnishing service, is the sum of $13,700. We are further of the opinion and find that the present rates are developing a reason-

able return upon the fair value of the property of the said company.

[3, 4] The schedule of rates now in effect, which is based upon the so-called room-rate schedule, is not readily understood and, in our opinion, a more simple schedule would result in less conflict. While the room-rate schedule may be practicable in a city the size of Fargo, we doubt the wisdom of adopting such a schedule in a village with a population of 200. It is our recommendation that the Farmers Elevator Company file with the Commission within thirty days a rate schedule constructed upon a kilowatt hour per month basis. That the top step of the new lighting schedule (residential) provides a maximum of 25 kilowatt hours used per month at 20 cents per kilowatt hour, gross, with a net of 18 cents if paid within the discount period—the balance of this schedule to be worked out by the company; and that the electric refrigerator rate asked for in this petition be incorporated in the new schedule, as well as the reconnection charge and disconnecting rule. We will also require the company to install a system of accounting which will more clearly show the actual operating expenses of the electric utility as distinguished from the operations of the company as a whole.

Having given careful consideration to all the testimony in this proceeding and being fully advised in the premises, the Commission is of the opinion and finds that the present rates of the Farmers Elevator Company are developing a reasonable return upon the fair value of the property used and useful in furnishing service, but that the schedule of rates as now constructed is not practicable in the village of Arthur. We further find that the Farmers Elevator Company have failed to justify the changes in rates proposed, except with respect to electric refrigeration. We further find that the rules proposed by the company for disconnecting and reconnecting meters and governing unpaid bills are reasonable and they are hereby approved.

It is therefore *ordered* that the Farmers Elevator Company shall file with the Commission not later than September 1, 1927, schedule of rates constructed in accordance with the recommended basis above, and which rates shall become effective with the meter readings for the month of September.

It is *further ordered* that effective September 1, 1927, and thereafter, the rate for electrical refrigeration with ¾ horse power or less shall be 10 cents per kilowatt, with a minimum charge of $1 per month. No discount.

RHODE ISLAND PUBLIC UTILITIES COMMISSION.

RE JOHN LABELLE.

[Application No. 753, Order No. 1165.]

Monopoly and competition — Adequate service protection to traction monopoly — Automobiles.

1. Where an existing utility is maintaining an ample and sufficient service to meet all traveling requirements, public convenience and necessity cannot be involved and no permit to compete with such service will be issued, p. 475.

Monopoly and competition — Competition by busses — Unemployment.

2. The Commission considered the unemployment of professional traction crews which might result from competition by automobiles as a ground for refusing a certificate to a motor carrier over the route of an existing utility, p. 475.

Certificate of convenience and necessity — Ground for refusing — Citizenship of applicant.

3. An application for a certificate of convenience and necessity was refused on the ground, among others, that the applicant had not shown himself to be a citizen of the United States, p. 475.

[August 10, 1927.]

APPLICATION for certificate of convenience and necessity to operate bus route; refused.

Appearance: G. Frederick Frost, for United Electric Railways Company.

By the **Commission**: It appearing that all parties at interest having been notified in accordance with law and notice of hearing having been published in the Providence Journal under dates of July 30 and August 1, A. D. 1927 and public hearing having been held under date of August 10, A. D. 1927 at the office of the Commission, Room 121, State House at 11 o'clock A. M. Eastern Daylight Saving Time.

[1–3] In this application a certificate of convenience and necessity is sought to establish a jitney bus route between Olneyville, Rhode Island and Lymansville, Rhode Island. This route if granted would set up direct competition with a street railway over the same street and between the same termini. The Commission have previously held where a public utility, a street railway company, or steam railroad company, was maintaining an ample and sufficient service to meet the requirements of the traveling public that there was no public convenience and necessity involved and that no permit to compete with such service over the same route would be issued. What the Commission is interested in is seeing that the public have dependable transportation service and a responsible transportation service. The street railway has a tremendous investment in its rails, power plant, and operating equipment and it can not abandon the service without getting authority from the state. Another matter that is involved in this is the very serious effect of a continued competition on the people who have entered the employment of the street railway as conductors and motormen upon their cars. An operation of this kind and the operation of the privately owned automobile has resulted in throwing a large number of those men, who have picked their life work therein, out of employment, or has made their employment irregular, and they suffer a hardship thereby. From that point of view the Commission will deny this application, first, on the ground that the applicant is not a citizen of the United States or has not shown it in this proceeding and, second, on the ground that there is no public necessity and convenience for operation over the same route in direct competition with the street railway between Lymansville and Olneyville.

SOUTH DAKOTA BOARD OF RAILROAD COMMISSIONERS.

RE DIKE POWELL, JUNIOR.

[Order No. 1161–A.]

Monopoly and competition — Motor carriers — Evidence of inadequate service.

The fact that an applicant for a certificate of convenience and

necessity to operate a motor carrier service in competition with existing carriers has been maintaining better service without authority over the same route is no proof of the inadequacy of the existing service, and authority should be denied when the holders of certificates can amend their schedules and improve their service in such a manner as to take care of the business.

[August 10, 1927.]

APPLICATION for certificate of convenience and necessity; application refused.

Appearances: Roscoe Knodell, Attorney, for the applicant; O. D. Olmstead, Attorney, for the Black Hills Bus Company.

By the **Board:** Dike Powell, Jr., of Winner, makes application to the Board for a certificate of convenience and necessity to operate as a Class A motor carrier, in the transportation of persons and property, for hire, between Winner and Mission, via Jordan, Carter, and Okreek. After notice, hearing was held at Winner.

The applicant operates a star mail route between the towns above named, under a contract with the United States Post Office Department, entered into July 1, 1926. The distance from Winner to Mission is 45 miles. The record shows that the operators of this star route have been engaged in the transportation of passengers and property for hire between these towns since 1922. This refers to the applicant and his predecessors. Although a motor carrier law has been upon the statute books of the state of South Dakota since 1923, neither this applicant nor his predecessors have complied with its requirements.

Charles A. McMurray of Carter is the holder of Certificate No. 33-A, under which he is authorized to transport property for hire as a Class A motor carrier between Winner and Mission via Jordan, Carter, and Okreek, at rates and upon the time schedule on file with the Board. This schedule shows that McMurray operates daily except Sundays.

The Black Hills Bus Company, a partnership composed of E. E. Kendall and Alvin G. Swanson, filed an application in February, 1926, for authority to operate as a Class A motor carrier in the transportation of persons and personal baggage between Winner and Hot Springs via Jordan, Carter, Okreek,

Mission, Rosebud, Parmalee, Vetal, Martin, Batesland, Pine Ridge, Oglala, and Smithwick; the service being tri-weekly, which after hearing was granted. With the exception of Winner, Smithwick, and Hot Springs, all of the above named are inland towns, and the territory served includes the Pine Ridge and Rosebud Indian Reservations. The Black Hills Bus Company holds Class A motor carrier Certificate No. 55-A, and operates its busses on the following schedule: Leave Winner 8 A. M., Mondays, Wednesdays, and Fridays; arrive Mission 9:25 A. M., arrive Martin 11:45 A. M., arrive Hot Springs 6:30 P. M. Leave Hot Springs 7 A. M., on Tuesdays, Thursdays, and Saturdays; arrive Martin 11:30 A. M., Mission 3:40 P. M., arrive Winner 6 P. M.

There was considerable testimony in behalf of the applicant tending to show public convenience and necessity. He leaves Winner daily except Sunday at 7:30 A. M., and arrives at Mission at 11 A. M., leaving Mission at 12 noon and arriving at Winner at 3:30 P. M., making connection with other mail carriers at Mission who operate between that point and Valentine and Crookston, Nebraska, and White River, South Dakota. The record shows that the Black Hills Bus Company also makes these conections on Mondays, Wednesdays, and Fridays. The applicant arrives in Winner in time to make connections with the eastbound Winner-Bonesteel Bus. Under its present schedule, the Black Hills Bus Company arrives in Winner too late to make that connection. It was testified that the mail carriers operating out of Mission all carry passengers, for hire, although the records of this office fail to disclose that any of them have met the requirements of the motor carrier law. The number of passengers arriving from the west who desire to make connections with the Winner-Bonesteel bus are variously estimated from one to four a week. This bus leaves Winner at 4 P. M. daily.

Many of the principal business men from the city of Winner appeared and testified in support of this application. The burden of their testimony, however, was directed to the convenience of shipping out small parcels and light freight to the stores and customers at Jordan, Carter, Okreek, and Mission. It appears from the record that Mr. Powell has been most accommodating;

calls at their place of business in Winner before leaving; handles all shipments on a C. O. D. basis; and is prompt and dependable. These shipments appear to consist of practically all kinds of merchandise but special reference was made to the handling of meat, butter, and ice cream. The witnesses appear to prefer having these shipments made early in the morning rather than waiting until later in the day when the McMurray truck is due to leave Winner. It was admitted by some of these witnesses that most of the parcels could be shipped by parcel post except for the fact that occasionally the mail from the west is late getting in with the result that it is impossible to have these shipments ready for the morning return mail. The record is somewhat conflicting in this particular as it shows that the mail from the west which is brought in by Mr. Powell is very seldom so late as to miss the Winner-Bonesteel Bus and witness Butts testified that "when the mail arrives on time from the west there is ample time to put up the orders and mail the parcels." It was pointed out that such articles as butter, meat, and ice cream cannot be successfully handled by parcel post. If the truck line operated by Mr. McMurray was being operated according to schedule, such articles of freight would undoubtedly receive satisfactory service. Quite clearly, the business men of Winner strongly favored the granting of authority to this applicant because of his courtesy, promptness, and dependability.

A witness for the Black Hills Bus Company testified that it enjoyed fairly good business in the transportation of persons between Winner and points west of Mission, but that there was practically no patronage between the towns served by this applicant. An offer was made by the representatives of the Black Hills Bus Company to establish a daily except Sunday run from Winner west to Mission or possibly to Martin, and stated that if the permit were amended to include the carrying of parcels and light express packages, the bus company would be glad to accommodate its patrons in this particular.

The applicant, as has been stated, has been transporting persons and property since July 1, 1926, without authority, and has kept no records, made no reports, and paid no compensation to the state for the maintenance of the highways. The applicant

was unable to estimate the number of persons carried by him during that time.

In addition to the above mentioned Class A carriers, there is a Class B permit held by an operator residing at Okreek to transport property to and from that vicinity, a large part of which comes from or is shipped to Winner. Witness Frescoln, who is the postmaster at Winner, testified that the general public seems to have very little knowledge of the existence of the Class A carriers. Obviously, it is a duty of both the Black Hills Bus Company and Charles A. McMurray to advertise their respective businesses and schedules.

Section 10 of Chap. 224 of the Session Laws of 1925 reads in part as follows:

"In determining whether or not a certificate or permit should be issued, the Board shall give reasonable consideration to the transportation service being furnished . . . by any railroad or other existing transportation agency . . . and the effect which such proposed transportation service may have upon other forms of transportation service which are essential and indispensable to the communities to be affected by such proposed transportation service or that might be affected thereby."

After a careful consideration of the entire record, the Board finds that the operations of the Black Hills Bus Company and Charles A. McMurray or the equivalent thereof are essential and indispensable to a vast inland territory; that there is no testimony in the record to show any necessity for an additional agency to operate over this route; that if there is a demand for increased service, the existing carriers should be entitled to the preference and should be permitted to amend their schedules and improve their services in such a manner as to take care of the business. With the above excerpt from § 10 of the motor carrier act before us, we find that the effect of the establishment of the proposed transportation service upon both of the existing carriers would be injurious to say the least. Obviously, every pound of merchandise carried by Dike Powell and every person transported by him is business which could be handled by one or the other of the existing legal carriers, if proper provision were made therefor.

If the Black Hills Bus Company will improve its service to include daily transportation west from Winner and the arrival of its busses from the west in time to make connections with the Winner-Bonesteel bus, the Board believes that ample passenger service would be furnished and that no justification exists for the establishment of the line proposed by this applicant. We, therefore, conclude that an order should be entered denying this application.

ORDER.

In this case, the Board having completed its investigation and made and filed its report containing its findings of fact and conclusions thereon, a copy of which is hereto annexed, hereby referred to and made a part hereof, and the Board being fully advised in the premises and sufficient cause for this order appearing;

It is therefore *ordered* that the application of Dike Powell, Jr., for a certificate of convenience and necessity to operate as a Class A motor carrier, in the transportation of persons and property, between Winner and Mission, be and the same is hereby denied.

It is *further ordered,* that the said applicant, Dike Powell, Jr., be and is hereby admonished to cease and desist from his operations as a motor carrier over the highways of the state of South Dakota for hire, either in the carrying of persons or property.

WISCONSIN RAILROAD COMMISSION.

RE NORTH-WEST TELEPHONE COMPANY.

[U-3604.]

Return — Telephones — Expense of improvements — Increased rates.

1. Regardless of inaccuracies of utility estimates for increased rates, the Commission will recognize that improved and adequate service is more expensive than former inadequate service and will endeavor to adjust rates to allow a fair return on the additional investment, p. 482.

Rates — Improved service as a condition subsequent to increase — Telephones.

2. Increased rates allowed on a presumption of immediate improve-

ment of service will be improper and discontinued if such improvements are not later established, p. 483.

Return — Operating expenses — Telephones — Cost of switching service.

3. In an effort to reduce the operating expenses of a utility operating a number of exchanges under different local circumstances and conditions, to a unit per company telephone, the Commission excluded a specific amount per service station that seemed to represent the actual additional cost of the utility for furnishing switching service, p. 483.

Return — Operating expenses — Telephones.

4. The Commission concluded that the usually reduced cost of maintenance of grounded lines as compared with metallic exchanges of the same company was offset by the great length of the former, and the same cost allowed for both, p. 484.

Service — Telephones — Metallicizing policy — Grounded service.

5. The program of a utility operating a number of lines, some of which were still grounded, in proposing to metallicize about five miles of ground line each year with the consent of the majority of subscribers on each line in turn, was approved and commended, p. 485.

[September 30, 1927.]

APPLICATION for increase of telephone rates; increase modified.

By the **Commission**: The petition in this case is dated June 30, 1927. Applicant represents and shows:

(1) That it is a Wisconsin corporation having its principal place of business in the city of Madison, Wisconsin, and is a public utility owning and operating a telephone exchange at Tomah, Monroe county, Wisconsin. That as such utility it is subject to the provisions of Chapter 196, Wisconsin Statutes.

(2) That under the provisions of said chapter it is unlawful for any public utility to increase its rates without obtaining authority to do so from the Railroad Commission of Wisconsin.

(3) That the lawful rates of this applicant now in effect are as follows: [Schedule omitted.]

Subsequent to the filing of the application and under date of July 19th the company asked to amend the original application by providing among the proposed rates and rules the following:

"Summer cottages, full year rate with a discount of 75 cents per month during the winter season."

Hearing was held July 29, 1927, at Tomah, at which time the company was represented by W. R. McCaul of the firm of Naylor

& McCaul, and by John S. Allen, its president. On behalf of the city of Tomah, Herbert A. Rose, City Attorney, appeared. The appearance of L. B. Squier, editor of the Tomah Journal, was also entered.

It appears that the property of the Tomah exchange was acquired by North-West Telephone Company as of November 1, 1925. The Commission at that time fixed the value of the property for the purpose of a security issue at $85,000 and according to the testimony introduced the additions since would increase this total to $92,600.

According to the report for the year 1926 the company had available, after expenses and after provision of $4,260 for depreciation, a total of $6,036.79. In that year the telephone operating expenses, before depreciation but including taxes, amounted to $12,147.89. At the hearing an exhibit was introduced on behalf of the company showing total operating expenses before taxes and depreciation for the year ended June 30, 1927, of $12,797.60. Taxes in 1926 were reported as $666.14 and at the same rate for the year ended June 30, 1927, would make the expenses for that period $13,463.74, or about $1,300 more than those for the calendar year 1926. Partial explanation of this increase is contained in the fact that the number of telephones in service increased from 858 at December 31, 1925, to 1,012 at December 31, 1926.

Some years prior to the acquisition of the property by its present owner the number of telephones in service was very radically reduced, especially in the rural districts, following a rate increase. Several hundred telephones were removed from service and the previous owners of the property were not able to accomplish much in the way of reconnecting this service. Since the property was taken over by its present management a large number of these telephones have been restored.

[1] As in other cases which this company has brought before the Commission, an exhibit has been presented containing estimates of increased expenses, which to our mind are inconclusive. Nevertheless, we must recognize the fact that beyond a doubt adequate telephone service, which we believe the present company intends to furnish, will be more expensive than the character of

service which has heretofore been furnished and that rates should be so adjusted as to permit the company to furnish adequate service and to earn a reasonable return.

[2] The difficulty comes in determining how much money the company will have to expend to furnish that service. The best that we can do is to make an estimate of the requirements. The history of this property gives us very little basis to work on nor has the present owner been in the telephone business for a sufficiently long time so that any very definite conclusion can be reached as to what its operating cost will actually be. We believe that it is the intention of the present owner to give a good grade of telephone service. This order is predicated on that assumption. If a standard grade of telephone service is not furnished it will follow that the rates which have been allowed by this decision are improper and should not be continued in effect.

[3] The Wisconsin Telephone Company operates a considerable number of exchanges comparable in size to the one at Tomah. In general, these exchanges furnish a modern type of telephone service with lines and equipment maintained properly. It would seem, therefore, that the best indication available of what a good grade of service at Tomah should cost might be obtained from an examination of reports of the Wisconsin Telephone Company. The difficulty that is encountered in this examination is that the various exchanges of this company conduct their business at unit costs which differ considerably. The problem of reducing the operating costs to a unit is somewhat complicated by the fact that most of the exchanges studied furnish some amount of service to switching or roadway companies. For the purpose of reducing the operating expenses to a unit per company telephone we have excluded $4 per service station on the assumption that this somewhere nearly represents the actual additional out of pocket cost to which the Wisconsin Company is put annually because of furnishing this switching service. With this amount excluded, the operating expenses of the various exchanges studied were as follows per company telephone:

Berlin	$18.80
Mayville	18.20
Waupaca	18.10
Columbus	16.70
Waupun	16.60
Kaukauna	16.30
Oconto	16.10
River Falls	15.60
West Bend	13.50
Hartford	13.40

The above unit costs are exclusive of any provision for depreciation and return.

[4] In general, the rural service at Tomah is furnished over grounded lines and the cost of maintenance might be somewhat less per telephone than that of the Wisconsin Telephone Company's exchanges if this factor were not offset by the extreme length of some of these lines. We are inclined to believe that a unit cost for operating and maintaining the Tomah exchange about equal to the weighted average unit cost of the exchanges listed above will be substantially correct. This would amount to $16.15 per company station.

The company's Exhibit I presented at the hearing lists a total of 1,082 stations of which 24 are on switched lines, leaving 1,058 company owned stations including extensions. Inasmuch as the unit cost derived above is based on company owned stations including extensions, it is only fair to use the total number of company owned stations at this point. Making an allowance of $16.15 per company owned station and further allowance for $4 per year per station of out-of-pocket cost for switching service, we reach a total estimated operating expense before depreciation and return amounting to $17,182.70. The company has based its estimates for depreciation and return on a value of $92,500 and we think the composite allowance included in the company's exhibit is not far from correct. It is probable that, because not all subscribers who discontinued service have come back on the company's lines, the present equipment is not, strictly speaking, fully used and useful. There can be little doubt, however, that the company will have to make considerable improvements and we are inclined to accept the estimated provision for depreciation and return which amounts to $12,025 and brings the total estimated cost of furnishing a high grade of service to $29,207.70.

The company included in its application provision for an excess radius charge on rural telephones at distances of more than six miles from the central office. At the hearing the representative of the company was not disposed to press this part of the application and we are inclined to believe that it would be better not to include any excess radius charge under present conditions. No increase is contemplated by the application now before us for rural residences on grounded lines. At the hearing the president of the company suggested that the proposed increase for rural metallic service be made effective January 1, 1928.

[5] It was also suggested that the company adopt a program of metallicizing rural lines so that about five lines should be made metallic each year and subscribers be placed upon the metallic rate after the change over. It was suggested by the president of the company that the company would endeavor to secure the consent of the majority of the subscribers on each line which it was about to make metallic. We think the company's program in this regard is meritorious and shall offer no objection to it.

This brings us to the question of what schedule of rates need be established to produce the required revenue. The company's exhibit is not complete with reference to the classification of the rural telephones in that the number on metallic lines is not shown separately. However, as we understand that this is only a relatively small part of the total it will not make any great difference in the estimated revenue. The schedule proposed by the company would produce revenue very much in excess of its requirements and in addition we think it is not properly balanced as between classes of service. It is our opinion that the schedule provided by the order in this case is fair and reasonable and will meet the requirements of the company.

WISCONSIN RAILROAD COMMISSION.

FARMERS TELEPHONE COMPANY

v.

WISCONSIN TELEPHONE COMPANY.

[U-3550.]

Rates — Commission powers — Power of utility to reduce rates without hearing — Telephones.

1. A utility may reduce its rates without the formality of a hearing by merely filing the new schedule with the Commission, which will not interfere unless the successful operation of the utility is threatened or unjust discrimination caused thereby, p. 488.

Monopoly and competition — Power of Commission to eliminate rate cutting — Telephones.

2. Competitive rate cutting by a telephone company which will be able adequately to serve the community at a loss, and which charges the resulting losses to amount available for return and not to operating expenses, does not present a situation which jeopardizes the telephone service of the community other than the competitive condition which the Commission is powerless to eliminate, p. 488.

Monopoly and competition — Commission power — Telephones.

3. In a state where the legislative policy is to protect competition of utilities, whether either competing company has been guilty of unfair practices as regards the other utility, is not a question for the determination of the Commission, p. 489.

Rates — Reasonableness — Competition — Reduction — Telephones.

4. Unless there is a request for authority to increase rates by a utility, the reasonableness of the rates cannot be put in issue, and a complaint of a competitive utility against a reduction of rates as unreasonable must be dismissed, p. 489.

[September 16, 1927.]

COMPLAINT of telephone company against reduction of rates by competing utility; dismissed.

By the **Commission:** On March 5, 1927, the Farmers Telephone Company of Lancaster filed with the Commission a petition alleging that the rates for local service charged by the Wisconsin Telephone Company at Lancaster are discriminatory and in the nature of unfair competition and requesting the Commission to establish a uniform rate for telephone service in the city of Lancaster applicable to both the Wisconsin Telephone Company and the Farmers Telephone Company.

A hearing was held at Madison on April 13, 1927, at which the Farmers Telephone Company was represented by Frank Winter, Attorney, Chris Kartman, President, and Hugh A. Harper, Secretary. The Wisconsin Telephone Company was represented by J. F. Krizek, Attorney, F. M. McEniry, Commercial Superintendent, and W. F. Ennis, Local Manager. A brief was filed by Frank Winter.

The testimony shows that prior to the passage of the public utility law both of these companies were operating in the city of Lancaster. The Farmers Telephone Company at the present time has the greater number of local subscribers, and the Wisconsin Telephone Company's exchange is operated at a loss at the present rates. The local residence rate of the Wisconsin Telephone Company is $12 per year. There is a physical connection between the two exchanges and messages are interchanged at the rate of 5 cents per message. The patrons of the Farmers Telephone Company have access by this physical connection to toll service in the state of Wisconsin, but do not have access to interstate toll service, whereas patrons of the Wisconsin Telephone Company have access to both intrastate and interstate toll service. It appears that the two companies have been in active competition for many years. The Farmers Telephone Company desires to establish rates commensurate with the cost of the service being rendered but does not feel justified in so doing unless the Wisconsin Telephone Company will do likewise so as to preserve the status quo as to competitive advantage and this proceeding is brought with the purpose of forcing an equalization and an increase of rates applicable to both companies.

The Commission, recognizing the undesirable conditions which inevitably result from competitive conditions in the telephone business, has endeavored by informal negotiations to bring about the sale of one or the other of the exchanges to the other operating company. The Wisconsin Telephone Company over a period of several years has indicated its willingness to sell but has insisted on certain conditions which were objectionable to the Farmers Telephone Company. Subsequent to the hearing in the present proceeding, however, the Wisconsin Telephone Company made a bona fide unconditional offer in writing to sell its property

at Lancaster, other than its toll system, to the Farmers Telephone Company at a price to be fixed by the Railroad Commission. Action in this proceeding has been delayed pending the consideration of this offer by the Farmers Telephone Company. That company, however, has now advised the Commission that the proposal has been definitely refused by its directors.

[1] In administering the public utility act, this Commission has construed the law to mean that a utility may reduce its rates without the formality of a hearing by merely filing the new schedule with the Commission, subject, of course, to the power of the Commission to act should there be discriminatory or other objectionable features in the proposed schedule. It has been assumed that the utility management is competent to determine whether a lower rate is consistent with the financial status of the company, and even though a utility has placed in effect rates which are less than the actual cost of the service rendered, the Commission has not seen fit to interfere unless the successful operation of the utility were threatened, or unless unjust discrimination were created thereby. In other words, the Commission has refrained from taking action which would deprive the public of the benefits of a low service rate if the company is willing to provide service on that basis.

[2] In the present case, there can be no reasonable question of the ability of the Wisconsin Telephone Company to continue to furnish telephone service in Lancaster even at a loss; and such loss would, under proper accounting practice, be taken from the amount available for return and would not be charged to the cost of operation of any other property of the company. The Commission has no information to indicate that the losses sustained at Lancaster have not been taken care of properly in this manner. The two companies which are competing at Lancaster are on an equal footing as regards the legal right to serve. If, therefore, either should prove to be unable to meet the competition of the other and should retire from the field, the city of Lancaster would still be in a position to secure reasonably adequate service at reasonable rates. There is nothing in the present situation, therefore, which jeopardizes the telephone service of the people

of Lancaster other than the competitive condition which this Commission is powerless to eliminate.

[3] The legislature has protected the competition of utilities which existed prior to the passage of the utility act and also such competition as may be permitted by the Commission through the issuance of certificates of public convenience and necessity authorizing the construction and operation of second utilities in specific communities. No limit is placed upon such competition by the statutes except such regulations as have been made generally applicable to all business operations. Whether either company has been guilty of unfair practices as regards the other utility is not a question for the determination of this Commission.

[4] The sole question presented for decision is whether under the existing competitive conditions the existing rates are unreasonable or discriminatory as regards the public. No request for authority to increase rates having been made by the Wisconsin Telephone Company, the reasonableness of the rates as regards the company is not in issue.

The Commission finds:

1. That the existing rates of the Wisconsin Telephone Company are reasonable as regards the public served thereunder.

2. That the fact that these rates are lower than the Commission would be obliged to authorize upon the proper application of the Wisconsin Telephone Company does not give rise to unjust discrimination against other telephone users in the city of Lancaster or against other patrons of the Wisconsin Telephone Company in other cities.

3. That the rates complained of are not such as to jeopardize the furnishing of reasonably adequate telephone service to the city of Lancaster.

It is therefore *ordered* that the petition herein be and the same is hereby dismissed.

P.U.R.1928A.

XUM

MISSOURI SUPREME COURT, DIVISION NO. 1.

STATE EX REL. WABASH RAILWAY COMPANY et al.

v.

PUBLIC SERVICE COMMISSION et al.

[Nos. 25086-25088.]

(— Mo. —, 295 S. W. 86.)

Constitutional law — Retrospective legislation — Proceedings commenced under repealed law.

1. Where the State Constitution, Article 2, § 15, provides that legislation shall not be retrospective and different state statutes enact that judicial proceedings commenced under any law shall not be affected by subsequent acts repealing the same, a suit against a Public Service Commission under a law giving to that body discretion in regulating viaduct structures, is not subject to the operation of a later law making it mandatory, unless found impracticable by the Commission, that all viaducts shall be at least 22 feet above the track, p. 495.

Constitutional law — Retrospective legislation — Creation of new rights.

2. Where a law prohibiting the construction of viaducts less than 22 feet over a railroad track, unless found impractical by the Public Service Commission, supersedes a former statute resting the discretion of viaduct regulation in the Commission, it creates a new and distinct right and not a mere procedural variance of the old power, and is, therefore, retrospective as regards proceedings commenced under the former law, p. 497.

[May 24, 1927.]

DECISION of Missouri supreme court as to effect of statute passed subsequent to reversal of original proceedings by the United States Supreme Court; findings made and former judgment reinstated.

Appearances: D. D. McDonald, of Jefferson, General Counsel, for appellant Public Service Commission of Missouri; Julius T. Muench, City Counselor, and Oliver Senti, First Associate City Counselor, both of St. Louis, for appellant city of St. Louis; Marion C. Early, of St. Louis, for appellants Gerhart, May & Guiseffe; Lawrence McDaniel, of St. Louis, for Rodehaver, Keiffer, and West End Grade Crossing Association; Homer Hall and N. S. Brown, both of St. Louis, for respondent Wabash Railway Company.

Lindsay, C.: There was a former hearing of these appeals, in which all the issues then raised were determined, and judgment was entered, setting aside the order of the circuit court of Cole county, and sustaining the order of the Public Service Commission. The order of the Commission required a separation of grades, and the construction of a viaduct to have a vertical clearance of 18 feet over the railway tracks, at the Delmar boulevard crossing in the city of St. Louis. The grounds of that judgment are stated in the opinion rendered upon that hearing, and reported in 306 Mo. 149, 267 S. W. 102. The present hearing is supplemental in character, and arises upon preceedings had since the rendition of that judgment. Following that judgment, and on March 12, 1925, respondents Wabash Railway Company et al. were allowed their writ of error by the Supreme Court of the United States. Thereafter the legislature passed the act approved April 30, 1925 (Laws of Missouri 1925, pp. 323, 324), whereby it was provided that, except in cases in which the Public Service Commission finds that such construction is impracticable, viaducts thereafter built over any railroad tracks should be not less than twenty-two feet in the clear from the top of the rails. The Supreme Court of the United States (273 U. S. 126, 71 L. ed. —, 47 Sup. Ct. Rep. 311), when it came to consider the case, held that the situation created by the statute, enacted after the entry of the judgment by this court, presented a question of state law, which that court in the exercise of its appellate jurisdiction could decide, but was not obliged to decide, and said that the question of the meaning, and effect of the statute upon the order of the Commission, the judgment of this court, and upon action taken pursuant to them, was primarily for determination by this court. To the end, therefore, that this court might be free to consider the question, and make proper disposition of it, the judgment of this court was reversed and the cause remanded for further proceedings. In obedience to such mandate and opinion, this court set aside its own judgment, the cause was set for such hearing as directed by the Supreme Court of the United States, and pursuant thereto counsel for the parties have been heard in oral argument, and have filed briefs directed to the question so put at issue.

The statute to be considered is § 1 of the act mentioned, and it is as follows:

"Except in cases in which the Public Service Commission finds that such construction is impracticable, bridges, viaducts, tunnels, overhead roadways, footbridges, wire, or other structure hereafter built over the track or tracks of a railroad or railroads by a county, municipality, township, railroad company, or other corporation, firm, or person, shall be not less than twenty-two feet in the clear from the top of the rails of such track or tracks, to such wire or other structure or to the bottom of the lowest sill, girder or crossbeam, and the lowest downward projection on the bridges, viaduct, tunnel, overhead roadway or footbridge."

Prior to the passage of this act, there was no statute prescribing uniformity of clearance in the separation of grades, and construction of viaducts at the crossings of streets or highways by railroads or street railroads; but, by § 10459, R. S. 1919, the Commission was given the exclusive power to determine the manner of installation and operation of any such crossing, and to require, where, in its judgment, it would be practicable, a separation of grades at any such crossing and prescribe the terms upon which such separation should be made. State ex rel. St. Joseph R. Light, Heat & P. Co. v. Public Service Commission, 272 Mo. 645, P.U.R.1918B, 767, 199 S. W. 999.

The question we have is one of the meaning to be given to the Act of 1925 and of its effect under the circumstances shown. It is to be considered in the light of constitutional and statutory provisions of the state, and in view of the relation of the parties and the nature of the subject-matter. Section 15 of article 2 of the Missouri Constitution provides:

"That no . . . law . . . retrospective in its operation . . . can be passed by the General Assembly."

In State ex rel. Scott v. Direkx, 211 Mo. 568, 577, 578, 111 S. W. 1, 3, in banc, it was said:

"The settled rule of construction in this state, applicable alike to the constitutional and statutory provisions, is that unless a different intent is evident beyond reasonable question, they are to be construed as having a prospective operation only. State ex rel. Haeussler v. Greer, 78 Mo. 188, 190; State ex rel. Harrison v.

Frazier, 98 Mo. 426 [11 S. W. 973]; Leete v. State Bank, 141 Mo. 574 [42 S. W. 1074]; Shields v. Johnson County, 144 Mo. 76 [47 S. W. 107]."

In State ex rel. Harvey v. Wright, 251 Mo. 325, 344, 158 S. W. 823, 829, Ann. Cas. 1915A, 588, also in banc, the substance of the foregoing was reiterated, and it was said the rule is in consonance with the text-book law. "In every case of doubt the doubt must be resolved against the retrospective effect." 36 Cyc. 1208.

The act of 1925 does not express a retroactive purpose, but by its terms it is plainly prospective in operation. It refers to viaducts to be constructed thereafter, and this reference, inevitably, is to viaducts which are to be constructed under orders of the Public Service Commission, and, therefore, necessarily under orders to be made by the Commission, after the passage of the act. Under the act, such order must require a construction affording a clearance of 22 feet, or, if directing a less clearance, must be predicated upon the finding of fact made that the making of a clearance of 22 feet in the given instance would be impracticable.

The discussion of the respective counsel turns upon the question whether there is a final judgment or was one when the act of 1925 went into effect. Counsel for appellants treat the judgment of this court as a final judgment, and urge that, since by the Constitution (§ 1, art. 6) the judicial power of the state is vested in the courts, this subsequent legislative act cannot be construed so as to vacate or nullify such judgment. Counsel for respondents say there is no final judgment, and insist that the principle mentioned applies only to final judgments or decrees, and cannot apply where the judgment in question was under review by appeal, or writ of error, at the time the statute in question was enacted. For that reason it is urged that the act of 1925 was not ineffective, as foreclosed by an existing, final judgment, but was effective as a controlling factor in a cause pending. Upon that, citation is made to several cases. American Steel Foundries v. Tri-Cities Central Trades Council, 257 U. S. 184, 66 L. ed. 189, 42 Sup. Ct. Rep. 72, 27 A.L.R. 360; Rafferty v. Smith, 257 U. S. 226, 66 L. ed. 208, 42 Sup. Ct.

Rep. 71; Eastern Building & Loan Asso. v. Welling (C. C.) 103 Fed. 352; Ketchum v. Thatcher, 12 Mo. App. 185; Rodney v. Gibbs, 184 Mo. 1, 82 S. W. 187. There are also other cases cited in support of the contention that a judgment pending a review does not have the finality of an adjudication, and attention is directed to the fact that this court has set aside its judgment.

In the American Steel Foundries Case, *supra,* the complainant's bill was one for injunction against employees engaged in a strike. An injunction was granted by a Federal District Court. An appeal was taken to the United States Circuit Court of Appeals. 238 Fed. 728. Pending the appeal, the Clayton Act (38 Stat. 730) was passed by Congress, which defined the powers of judges of United States Courts in granting restraining orders or injunctions in industrial disputes. The Circuit Court of Appeals took notice of, and gave effect to, the provisions of the Clayton Act upon that subject. Upon certiorari to the Supreme Court of the United States, it was contended that no retroactive effect could be given to the Clayton Act, because the rights had become vested by the decree of the district court, entered prior to the passage of the act. The Supreme Court held that the complainant had no vested right in the decree of the district court while it was subject to review; but in that case it seems there was also consideration that, because relief by injunction operates *in futuro,* the right to it must be determined as of the time of the hearing, and that, therefore, § 20 of the Clayton Act (U. S. Comp. St. § 1243d), relating to injunctions, was controlling, in so far that decrees, entered after its passage, should be made to conform to its provisions.

In the Rafferty Case, *supra,* which was before the Supreme Court of the United States for review by certiorari, the respondent had obtained a judgment against Rafferty, collector, for certain taxes on the value of exports from the Philippine Islands, collected under the ostensible authority of the act of the Philippine legislature. Subsequently, by an act of Congress, duties on such exports were legalized, ratified, and confirmed. This act of Congress was passed after the case had been taken to the Supreme Court for review, and the court gave effect to this

subsequent legislation. It was held that it was within the power of Congress to ratify the collection of the taxes, a thing which Congress might have authorized, but had not authorized before their collection, and that this subsequent ratification was valid, even as against a judgment for restitution obtained before the act of ratification, where the judgment at the time of ratification was reviewable and was subsequently reviewed. The substance of the holding in Ketchum v. Thatcher, *supra,* was that, when a judgment is appealed from with supersedeas or stay of execution, it must, until the appeal shall be determined, be denied recognition for any practical efficacy whatever, in a collateral proceeding.

The decisions in the American Steel Foundries and Rafferty Cases, *supra,* involved the question of the power of Congress by subsequent legislation to deal with transactions past, or pending under prior laws and the subject of litigation pending at the time of the enactment of the subsequent legislation. The question submitted to us is one of state law, and determinable in view of constitutional and statutory provisions of the state as construed by the state court.

Therefore, we do not think an extended discussion of the cases cited, or of the question of the status of the judgment vacated by this court pursuant to, and for purposes stated in, the opinion of the Supreme Court of the United States, is necessary. The case has been reopened to determine a single question of state law which has been submitted by the Supreme Court of the United States.

[1] Laying aside the question whether there is, or was, a final judgment, we have then an action pending, which is a judicial proceeding, the statutory action for review of an order of the Public Service Commission. The effect of the Act of 1925 upon this proceeding must be considered and construed not only in view of the terms of the act, which in itself is prospective in operation, but also in view of certain general statutes of this state, which are declaratory of policy, and guides to construction as well. In determining the effect of newly enacted laws upon pending actions or proceedings where the retroactive or prospective effect of the new law is in question, we look to §§

7061, 7063, 7065, R. S. 1919. The applicable part of § 7061 is as follows:

"Nor shall any law repealing any former law, clause or provision be construed to abate, annul or in anywise affect any proceedings had or commenced under or by virtue of the law so repealed, but the same shall be as effectual and be proceeded on to final judgment and termination as if the repealing law had not passed, unless it be otherwise expressly provided."

Section 7063 is as follows:

"The repeal of any statutory provision shall not affect any act done or right accrued or established in any proceedings, suit or prosecution, had or commenced in any civil case previous to the time when such repeal shall take effect; but every such act, right, and proceeding shall remain as valid and effectual as if the provisions so repealed had remained in force."

Section 7065 is as follows:

"No action, plea, prosecution, civil or criminal, pending at the time any statutory provisions shall be repealed, shall be affected by such repeal; but the same shall proceed, in all respects, as if such statutory provisions had not been repealed, except that all such proceedings had after the time of taking effect of the Revised Statutes shall be conducted according to the provisions of such statute, and shall be in all respects subject to the provisions thereof, so far as they are applicable."

The act of 1925 is not a repeal, in express terms, of the provisions of § 10459, R. S. 1919, or of any part of the latter section, but, necessarily, it is a repeal of § 10459 in part, and to the extent that it takes from the Commission the power to order the construction of a viaduct upon the unrestricted terms of § 10459. The effect of the general sections quoted was under consideration in State ex rel. Wayne County v. Hackman, 272 Mo. 600, 199 S. W. 990. It was there held that in their application they were not to be confined solely to judicial transactions. It was said, loc. cit. 609 (199 S. W. 991):

"The limitation of the operative effect of these sections to judicial transactions as contended for by respondent is not in accord with their terms, nor with the evident purpose of their enactment. Their general nature authorizes the conclusion that

they were intended to continue in force repealed laws until proceedings commenced thereunder, regardless of their nature, might be completed. This was the construction placed upon them in the cases cited, and we have been unable to reach a contrary conclusion."

[2] We think this is true whether the application of the Act of 1925 is sought to be made to the order of the Commission, or, as counsel for respondents further insist, is sought to be made to the judicial action pending, under the policy expressed in the sections foregoing, the cases mentioned, and the many cases cited in Christine v. Luyties, 280 Mo. 416, 217 S. W. 55. We think the result is the same whether we have a final judgment existing at the time the act was passed, or whether we consider that we have an action yet pending and not finally adjudicated. The Act of 1925 is not one going only to the remedy. It is an act, which, if given the application urged by respondents, would give to them in this case, not a new form of remedy, or a new method of procedure, but an absolute ground of recovery which did not exist at the time the act was passed. In Hope Mutual Insurance Co. v. Flynn, 38 Mo. 483, 485 (90 Am. Dec. 438), it was said:

"No new ground for the support of an existing action ought to be created by legislative enactment nor any legal bar which goes to deprive a party of his defense."

If the act be given the effect contended for by respondents, it would "affect" the action pending, not in the way of any change of procedure, or kind of remedy, or method of pursuing the remedy, but would create a right of action in respondents, a distinct and absolute ground of recovery, which did not exist when the action was begun, and irrespective of all the other issues originally made in the proceeding of review.

Our conclusion is that the Act of 1925 does not apply to the subject of this controversy, and that the judgment set aside should be reinstated.

Seddon and Ellison, Commissioners, concur.

Per Curiam. The foregoing opinion by Lindsay, Commissioner, is adopted as the opinion of the court.

All the judges concur.

Note.—Constitutional Law.

I. Delegation of powers, 498.
II. Personal and property rights:
a. Due process, 499.
b. Equal protection and immunities, 500.
c. Impairment of the right of contract, 500.
III. Police power, 501.
IV. Special and class legislation, 501.

I. Delegation of powers.

A statute as interpreted to vest in a court the power to order the Commission to exercise its discretionery power to issue a permit for motor vehicle operation is unconstitutional as investing legislative function to a judicial branch of the government. Washington Motor Coach Co. v. West (Md. Cir. Ct.) Sept. 2, 1926.

In Gallardo v. Porto Rico R. Light & P. Co. (C. C. A.) No. 2058, 18 F. (2d) 918, April 11, 1927, Anderson, Circuit Judge, in reversing a District Court decree enjoining the enforcement of the Porto Rico Water Power Act, said: "Plaintiff argues the whole Water Power Act void on the ground that the provision in § 5 [Acts Porto Rico, 1925, No. 60], that it shall be the duty of the Public Service Commission not to impair the new policy in the utilization of public waters by grants of franchises, is an attempt to nullify § 38 of the Organic Act (Comp. St. § 3803p), which reads: 'All grants of franchises, rights, and privileges of a public or quasi public nature shall be made by a Public Service Commission, consisting of the heads of executive departments, the auditor, and two Commissioners to be elected by the qualified voters at the first general election to be held under this act, and at each subsequent general election thereafter.' We cannot accept that proposition. Even if there be irreconcilable inconsistency, so that the provision in § 5, *supra,* must be held void, this would not invalidate the whole scheme of the act. The proviso in § 5 is not of the essence of the plan. The invalidity of a minor and nonessential provision does not affect the remainder of an otherwise valid statute. State ex rel. Bixby v. St. Louis, 241 Mo. 231, 145 S. W. 801. But we do not hold that there is any inconsistency between § 5 of the act and § 38 of the Organic Act. It is not now necessary or desirable for this court to determine the scope and effect of § 38. Plainly it may be argued that this section refers only to corporate franchises, not governmental undertakings, and that its scope is limited to the terms of franchises granted pursuant to general principles laid down by the Porto Rican legislature. If and when the Public Service Commission undertakes to grant a franchise alleged to be inconsistent

with the new public policy of the Water Power Act, and the question is presented by a plaintiff having a legal right to present the question, it will be time enough for this court to deal with it. Plainly, the plaintiff cannot now claim present or prospective injury from any such alleged inconsistency. Its right to apply to the Public Service Commission for any franchise the Commission has power to grant under the Organic Act has not been impaired by the Water Power Act. If, within the limits of its discretionary powers (whatever they be), the Commission should follow the new public policy and deny the application, plaintiff would have no legal cause of complaint."

II. Personal and property rights.

a. Due process.

Even where a particular regulation causes a pecuniary loss to the carrier, if it is reasonable with reference to the just demands of the public to be affected by it, and it does not arbitrarily impose an unreasonable burden upon the carrier, the regulation will not be a taking of property in violation of the Constitution. State ex rel. Burr v. Seaboard Air Line R. Co. — Fla. —, 111 So. 281, Jan. 10, 1927.

The necessity or expediency of taking property for public use is a legislative question upon which the owner is not entitled to a hearing under the due process clause of the 14th Amendment and the same clause of the Constitution of this state. Tift v. Atlantic Coast Line R. Co. 161 Ga. 432, 131 S. E. 46, Dec. 18, 1925.

The Railroad Law, §§ 90, 94, is not unconstitutional as requiring railroad companies to construct so much of a bridge street that will cross over their tracks in a valley, with an incidental approach, the companies to bear only one half the cost. Re East 238th Street, 215 App. Div. 152, 213 N. Y. Supp. 356, Jan. 15, 1926.

An order of the Corporation Commission requiring a railway company to renew lease to a private industry to a portion of its right of way without its consent is unauthorized and void, and constitutes a taking of private property of the railway company for a private use, in violation of the Constitution of this state. St. Louis-S. F. R. Co. v. State, No. 16679, 118 Okla. 89, 246 Pac. 876, May 25, 1926.

The provisions of the Motor Vehicle Act of 1925 as to notice, hearing and review sufficiently comply with the due process clauses of the state and Federal Constitutions. Re Griffin (S. D.) Order F–1101, Sept. 24, 1926.

The mere fact that the public service duty of a public utility requires the expenditures of capital for supplying suitable facilities reasonably necessary for the performance of the obligation does not

constitute taking of property without due process of law. United Fuel Gas Co. v. Kentucky R. Commission, 13 F. (2d) 510, April 22, 1925.

The mere fact that a state statute is claimed to violate the state Constitution is not a ground for invoking the jurisdiction of a Federal Court, except pending a determination of the question whether rates are confiscatory. Ibid.

b. Equal protection and immunities.

A rule of a water utility requiring a municipality to pay 200 per cent of the cost of extending water mains for fire service without anything in the rule negativing the proposition that the property will belong to the utility is unreasonable and void, in view of Constitution, article 8, § 10, prohibiting a municipality from loaning money or credit to aid a corporation. Mamaroneck v. New York Interurban Water Co. 126 Misc. 382, 212 N. Y. Supp. 639, Aug. 6, 1925.

The classification of motor carriers in the Motor Carrier Act of 1925 is not unnatural or arbitrary and does not violate a constitutional provision for equal privileges or immunities. Re Griffin (S. D.) Order F–1101, Sept. 24, 1926.

c. Impairment of the right of contract.

A telephone company was authorized to establish a toll charge between two telephone exchanges notwithstanding a franchise contract requiring free service. The Commission said in the present case it was interested in seeing that the subscriber to the two exchanges received an adequate, efficient, and nondiscriminatory service; that it could not take cognizance of this contract. Re Troy Teleph. Co. (Mo.) Case No. 4855, Jan. 10, 1927.

The consumer of electrical utility service cannot refuse to pay rates approved by the Commission on the ground that he has a contract with the company providing for lower charges. Niagara, L. & O. Power Co. v. Seneca Iron & Steel Co. 128 Misc. 335, 219 N. Y. Supp. 418, Dec. 7, 1926.

The West Virginia Commission has jurisdiction to consider a petition for an increase in rates notwithstanding a provision in the company's franchise limiting the amount of its charges. Re Barboursville Water & Light Co. Case No. 1701, Jan. 20, 1927.

A city plainly has the right to pass an ordinance which would otherwise be a violation of a contract, or the taking of property without due process, provided that such ordinance is the valid exercise of its police powers; and whether such an ordinance is a valid exercise of such powers depend upon the facts of each case. Dayton v. City R. Co. (C. C. A.) No. 4630, 16 F. (2d) 401, Dec. 9, 1926.

The prima facie existence of a contract in Ohio is indicated by

street railway company's acceptance of an ordinance authorizing it to operate one-man cars, involving large expenditures in readjusting its operating equipment within the constitutional rule forbidding the impairment of contracts. Ibid.

The right of a street railway company to operate under a valid city ordinance, accepted by it and authorizing the use of one-man cars and to use its assets in earning a return unburdened by the expense of operating two-man cars is a property right, protected by the due process clause of the Federal Constitution. Ibid.

A statute conferring upon a state officer the power to fix the price of gasoline in derogation of the constitutional guarantees of freedom of contract cannot be upheld as a valid method of suppressing monopolies which is declared to be one of its aims. Standard Oil Co. v. Hall, Nos. 304–306, 308, — F. (2d) —, Aug. 20, 1927.

A statute conferring upon a state officer the right and power to fix the prices at which gasoline shall be sold, in the absence of a controlling emergency, deprives both the seller and purchaser of the freedom of contract in violation of the 14th Amendment of the Constitution, in view of the limitation of regulatory powers to businesses affected with a public use. Ibid.

III. Police power.

The police power of the state cannot be abridged by private contracts. Clay County v. Chicago, B. & Q. R. Co. (Neb.) Formal Complaint No. 534, Nov. 3, 1925.

IV. Special and class legislation.

In Denny v. Muncie, 197 Ind. 28, 149 N. E. 639, Nov. 24, 1925, the supreme court of Indiana held that an ordinance regulating jitney bus operation was not unconstitutional. Gemmill, J., speaking for the court, said: "As the appellant did not have any natural right to carry on his business on the streets, no property has been taken from him by the ordinance without just compensation. Appellant says that there is an unjust discrimination made by the ordinance between routed jitneys on the one hand and roving jitneys, interurban jitneys, taxicabs, and other carriers of passengers on the other. Jitneys operating over particular routes properly form a class distinct from taxicabs and other service cars operating without any definite routes for the purpose of legislation. Berry, the Law of Automobiles (4th Ed.) § 1675; Allen v. Bellingham, 95 Wash. 12, 163 Pac. 18; Ex parte Parr, 82 Tex. Crim. Rep. 525, 200 S. W. 404."

A statute forbidding taxicab operators or automobiles engaged in casual trips from picking up passengers in certain territory does not violate a constitutional provision against the grant of 'exclusive,

separate public emoluments or privileges, except in consideration of public service. Harrison v. Big Four Bus Lines, 217 Ky. 119, 288 S. W. 1049, Dec. 10, 1926.

A statute forbidding taxicabs or automobiles engaged in casual trips from picking up passengers in certain territory is not invalid as class legislation. Ibid.

The inclusion of motor vehicles having a carrying capacity of five passengers or less in a classification rendering them subject to the regulation provided for in a motor vehicle statute is a matter within the legislative power. Ibid.

An ordinance prohibiting jitney busses from operating on certain streets is not class legislation that is an unconstitutional discrimination because motor busses and street cars are permitted to use those streets, since there is a marked difference in the construction and operation of the vehicles. Red Star Drivers' Asso. v. Detroit, 234 Mich. 398, 208 N. W. 602, April 14, 1926.

WISCONSIN SUPREME COURT.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY

v.

RAILROAD COMMISSION.

(— Wis. —, 215 N. W. 442.)

Reparation — Power of Commission to authorize — Order not mandatory.

1. The Commission has the authority to investigate, hear, and decide and make appropriate orders permitting and authorizing, but not attempting to compel, a public utility to refund any amount found to be an excessive, unlawful, or unreasonable charge, p. 504.

Reparation — Effect of Commission order authorizing refund — Railroads.

2. The effect of an order of the Commission authorizing a railroad to make a refund of a charge found to be unreasonable is to give apparent or prima facie authority to the utility to pay any particular shipper that which, except for such orders, might seem to be an unlawful preference, p. 504.

Reparation — Weight of Commission finding in court action — Railroad.

3. Upon the refusal of a carrier to make a refund authorized by the Commission, the aggrieved party may by statute (St. 1925, § 195.54) sue in the state courts to recover the amount of the excessive charge

but the findings of the Commission in such case shall only be prima facie evidence of the truth of the facts found by it, p. 505.

Constitutional law — Due process — Reparation suit — Excess demurrage.

4. A railroad electing to stand suit rather than yield to a Commission order authorizing a refund of excess demurrage, may assert any and all legitimate defenses that it may have or had to such order, and, therefore, its constitutional right to due process is undisturbed, p. 506.

[October 11, 1927.]

APPEAL by Railroad Commission from judgment of county court setting aside order of the Commission upon suit by railroad company; reversed and remanded. For Commission decision, see P.U.R.1925C, 464.

In 1923 the Monad Construction Company ran up certain demurrage charges with the plaintiff. Negotiations concerning them commenced in December, continued until June, 1924. The railroad company claimed $962; the construction company apparently conceding at times its correctness up to $683. Failing payment or adjustment, the railroad company sued in the civil court for Milwaukee county in June, 1924, and the Monad Construction Company answered denying liability; such suit is apparently still pending.

In August, 1924, the Monad Construction Company, under the provisions of the established freight tariff concerning demurrage rules and charges, requested the railroad company to enter into a so-called "average agreement" to cover certain proposed freight shipments the construction company then had in contemplation in connection with its highway work.

Such average demurrage agreement as distinguished from a straight demurrage plan permits a system of charges for delay and credits for promptness in unloading of freight cars, with provision for the balancing thereof and payment of balances monthly. A part of such tariff reads:

"Section (f)—A party who enters into this average agreement may be required to give sufficient security to this railroad for the payment of balances against him at the end of each month."

A form of such an agreement in accordance with such tariff rules was furnished the construction company by the railroad

company, executed by the former and returned to the latter, which did not execute the same, basing this refusal, as it is here contended by the construction company, because they refused to pay the 1923 demurrage charges. The railroad company by its pleadings, both before the Commission and in this case, practically conceded that it did demand the payment of such charges, but also contended that it insisted, as a precedent condition, that the construction company should furnish the bond specified in the above-quoted clause. Shipments were made in September and October, 1924, over the plaintiff's road, and, in order to secure delivery, the construction company paid, under protest, the straight demurrage charges.

In November, 1924, the construction company petitioned the defendant Railroad Commission for an order directing the plaintiff to refund $140 of such paid demurrage; such amount being concededly the excess under the straight demurrage rate over that which the construction company would have been required to pay had such proposed average agreement been in force.

The railroad company, among other things, objected to the jurisdiction of the Railroad Commission, and asserted further that no bond had ever been tendered to it by the construction company.

Upon the hearing, the Commission held that the privileges to the shipper under such an average agreement should have been extended, and that, therefore, the $140 excess payment was erroneous, illegal, unusual, and exorbitant, and that the railroad company is authorized to refund such sum. This action was then brought in the circuit court for Dane county to vacate and set aside said order of the Railroad Commission. The court below vacated and set aside such order as unlawful.

The Railroad Commission appeals.

Appearances: John W. Reynolds, Attorney General, and Suel O. Arnold, Assistant Attorney General, for appellant; H. J. Killilea and Rodger M. Trump, both of Milwaukee, for respondent.

[1, 2] **Eschweiler, J.:** The ground upon which the order of the Railroad Commission in the instant case was held invalid

is stated to be that the Railroad Commission, upon the petition to have the railroad company authorized to refund the $140 excess demurrage, unlawfully assumed a judicial function of determining contested questions of fact. This result, it is contended, is required by the holding of this court in Waukesha Gas & E. Co. v. Waukesha Motor Co. 175 Wis. 420, 184 N. W. 702. That case, however, passed upon a contest over a counterclaim, which was based upon assertion of a breach of contract entered into between the plaintiff, a public utility, and the defendant, for the furnishing by the utility of a certain agreed quantity of gas. It involved a purely contractual relationship and not as here the alleged violation of a statutory obligation. It was there held that such a dispute was for the courts and not for the Railroad Commission. It there expressly recognized, however (page 423 [184 N. W. 703]), the rule which must control here; namely, that for overcharges or inadequate service the Railroad Commission is given authority to investigate, hear, and decide and make appropriate orders, permitting and authorizing, but not attempting to compel, the public utility to refund any amount so found to be excessive, unlawful, or unreasonable. The order by the Railroad Commission here was not in the nature of a judgment against the railroad company, nor did the Commission undertake in any way to enforce such order. The real and only effect of such order is to give apparent or prima facie authority to the railroad company to pay to any particular shipper that which, except for such average agreement or such an order, might seem to be an unlawful preference of such particular shipper, and, therefore, might subject the railroad to a penalty under §§ 195.39 (1797–23) and 195.40 (1797–23), Stats., or the shipper under § 195.41 (1797–24).

[3] The proceedings before the Railroad Commission were in accordance with the express authority granted to that body by § 195.17 (1797–12), and in compliance with § 195.54 (1797–37m), Statutes.

As provided in said § 195.54, passed upon in the Waukesha Case, *supra,* the refusal of the carrier to make such an authorized refund permits the party aggrieved to maintain an action in the courts of the state to recover the amount of any such ex-

cessive charge so found, and on such trial the findings of the Commission shall be prima facie evidence only of the truth of the facts found by it.

[4] Plainly, therefore, the railroad company may be heard to assert in any such subsequent trial any and all legitimate defenses that it may have or had to such an order if it elects to stand suit. In such situation we cannot see that any constitutional rights of the railroad company to have its claims passed upon by the courts of this state have been infringed.

The result reached here is in accord with numerous prior decisions of this court. Graham Ice Co. v. Chicago, M. & St. P. R. Co. 153 Wis. 145, 140 N. W. 1097; Chippewa Power Co. v. Railroad Commission, 188 Wis. 246, 205 N. W. 900; Commonwealth Teleph. Co. v. Carley, — Wis. —, P.U.R.1927C, 164, 213 N. W. 469. The judgment below must be reversed.

Judgment reversed, and cause remanded, with directions to dismiss the complaint.

Vinje, C. J., took no part.

COLORADO PUBLIC UTILITIES COMMISSION.

CLEAR CREEK POWER AND DEVELOPMENT COMPANY

v.

PUBLIC SERVICE COMMISSION.

[Case No. 315; Decision No. 1340.]

Procedure — Complaint proceeding — Action on counterclaim.

1. The Commission, in a proceeding commenced by filing a complaint against an electric utility alleged to be invading the territory of another company, may determine a question raised by the answer for alternative relief, namely, whether in the event the defendant is not entitled to operate in the vicinity, a certificate of public convenience and necessity should be issued to it authorizing such operation, p. 509.

Monopoly and competition — Jurisdiction of Commission — Invasion of territory.

2. The Colorado Commission has jurisdiction under § 35 (a) to determine the questions raised by a complaint against an alleged in-

vasion of territory by an electric utility and, if the facts should warrant, to grant relief, p. 510.

Commissions — Jurisdiction — Effect of court action — Injunction proceeding.

3. The fact that a company complaining to the Commission against an alleged invasion of territory has gone into a court of equity to secure a temporary injunction to maintain the *status quo* does not terminate the jurisdiction of the Commission over the complaint, p. 510.

[June 24, 1927.]

COMPLAINT by an electric company alleging unlawful invasion of territory by another company; objections of complainant to further exercise of jurisdiction by Commission overruled.

Appearances: John J. White, Georgetown, Attorney for plaintiff; D. Edgar Wilson, Denver, Attorney for defendant.

By the **Commission:** On April 27, 1927, the Clear Creek Power & Development Company filed a complaint alleging that it is and at all times has been since January 10, 1922, a corporation organized and existing under and by virtue of the laws of the state of Colorado, and that it and its predecessors since 1907 have been engaged in the business of generating and furnishing electric current for light and power in the town of Empire and in the mines and mills in the immediate vicinity and territory. It alleges that the defendant is unlawfully constructing a transmission line from one of the latter's main lines in said county of Clear Creek into said Empire territory and is making or has made arrangements to supply electric energy to certain mines and a mill in said territory. The complaint concludes with a prayer for an order prohibiting the construction or extension of said transmission line by the defendant into said territory of Empire, and that the defendant be prohibited and enjoined from in any manner invading said territory or any part thereof and from supplying any power or electric current to any person or corporation in said vicinity, and that the rights of the "complainant be permanently established to serve in said Empire district and territory with electrical power and current" and for any other and additional relief, which shall be meet and proper.

It appears that the plaintiff understood that the defendant was proceeding with the construction of said transmission line after

the said complaint was filed. It thereupon filed a complaint in the district court of Clear Creek county praying for a temporary restraining order and, on final hearing, for a permanent injunction. This complaint was filed on May 7, 1927. An order termed "A temporary restraining writ of injunction" appears to have been entered in said case on May 10, 1927.

The defendant filed its answer on May 18, 1927, denying specifically or on information and belief most of the allegations contained in said complaint. It admits that it is constructing or has constructed a transmission line from one of its main lines in Clear Creek county into said Empire territory, and that it has entered into a contract to supply electric current and power to certain companies doing business therein. It admits that at the present time complainant is supplying a certain mill in said territory with electric current for light and other purposes but alleges that the arrangement, as the complainant well knows, is a temporary one. It denies that the complainant has supplied said current and power efficiently. It denies that the construction by it of said transmission lines into said territory constitutes a wrongful or unlawful invasion of the complainant's rights. It denies that the Empire territory heretofore has been supplied with electric current by complainant only. It denies that the complainant, its predecessors or grantors supplied said district or territory with electric current prior to the year 1913. It further denies that the building of the transmission line in question is a construction into territory never before served by the defendant, its predecessors or grantors. The defendant admits also that it has not heretofore made application to this Commission for authority to construct a transmission line to said mines and mill.

Further answering the defendant states that long prior to 1917 said territory was served and supplied with electric energy by the predecessors and grantors of the defendant and that as the successor and grantee of those companies, the defendant has a lawful right to furnish electric energy therein.

On June 2, 1927, the defendant herein filed what is termed an amendment to its answer in which it alleges, among other things, that the mining companies in question had made written applica-

tions to the defendant for extension of its lines so as to serve their mines and mill; that it accepted said application and in accordance therewith constructed or reconstructed a transmission line to the mines and mill aforesaid; that the electric energy furnished by the complainant has an uneven and unsteady flow and is totally unfit and unsuited for the purpose of running the machinery in said mines and mill.

The said amendment to the answer prays as in its original answer or in the alternative that this Commission enter an order approving and ratifying the construction by it of said line and authorizing this defendant to supply and sell electric energy to said mines and mill and granting it a certificate of public convenience and necessity for the extension, construction, erection, maintenance, and operation of its transmission line and distribution system for the distribution of electrical energy in said territory.

Thereafter the plaintiff filed written objections to the jurisdiction of this Commission to proceed further in the matter, claiming that the district court of Clear Creek county, sitting as a court of equity, has authority to determine all the questions involved in the application.

There appear to be three points involved herein:

1. Is it proper to determine in this matter, originally a complaint proceeding, the question raised by the prayer in the amendment to the answer for alternative relief, namely, whether, in the event defendant is not now entitled to operate in the vicinity, a certificate of public convenience and necessity should be issued to it authorizing such operation.

2. Would the Commission now have jurisdiction to consider the questions raised and to grant the relief prayed in the complaint if the complainant had not gone into a court of equity since the filing of the complaint?

3. If it would have such jurisdiction does the fact that the complainant has gone into a court of equity terminate the jurisdiction of the Commission?

[1] Rules of procedure of this Commission do not specifically provide for or forbid that applications for certificates of public convenience and necessity be made by way of counterclaim. In

Colorado Power Co. v. Pirie (anno.) P.U.R.1922B, 768, the former being the predecessor of the defendant herein, and the latter being the predecessor of the complainant herein, being Case No. 235 before this Commission, it appears that the complainant brought suit to prevent the defendant from supplying electric current to the city of Idaho Springs upon the ground that it alone had that right. The defendant answered denying the allegations of the complaint and asked for a certificate, just as has been done by the defendant in this case. The case was tried upon the issues made by the proceedings and the decision of the Commission was affirmed in Pirie v. Public Utilities Commission, 72 Colo. 65, P.U.R.1923A, 315, 209 Pac. 640.

The procedure of an administrative body such as this Commission is, should be free from technicalities and as elastic as the ends of justice will permit. We believe and find that the counterclaim in this answer is proper.

[2] Section 35 (a) concludes as follows:

". . . and, provided, further, that if any such public utility, in constructing or extending its line, plant or system, shall interfere or be about to interfere with the operation of the line, plant or system of any other public utility already constructed, the Commission, on complaint of the public utility claiming to be injuriously affected, may, after hearing, make such order prohibiting such construction or extension or prescribing such terms and conditions for the location of the lines, plants or systems affected as to it may seem just and reasonable."

This language seems so clear as to completely dispose of the question of the original jurisdiction of the Commission to determine the questions raised and to grant, if the facts should warrant, the relief prayed for in the complaint. The uniform practice of the Commission has been to assume and exercise jurisdiction in matters of this sort.

[3] We believe that it was doubtless proper, if the facts warranted, for the plaintiff to seek and secure from the district court of Clear Creek county, such order or orders as might be necessary to preserve the *status quo* pending the final order of the Commission. While this Commission possesses only administrative authority, it is necessary for it in the exercise of such authority,

in the absence of a judicial sentence, to take such action and to make such orders as it deems just and legal. We, therefore, conclude that no court merely because it is called upon to preserve a status is going to assume and take over the administrative duties delegated by the legislature to this Commission. No authority has been cited to the Commission to justify the contention that merely because it is necessary to call on a court of equity to preserve a status, that court will then take over and exercise administrative duties and functions of an administrative body. The maxim that equity renders complete relief is, we believe, confined to judicial relief. The one case which seemed to us possibly to support the contention of the complainant Board of Administration v. Peoria & P. U. R. Co. 273 Ill. 440, 446, P.U.R.1916E, 795, 113 N. E. 68, simply holds that a court has jurisdiction to determine the rights of a carrier and a private individual, arising out of a contract entered into by them.

Colorado authorities bearing on this question are: People ex rel. Hubbard v. Colorado Title & Trust Co. 65 Colo. 472, P.U.R. 1919A, 542, 178 Pac. 6; Clark v. Public Utilities Commission, 78 Colo. 48, P.U.R.1926B, 33, 239 Pac. 20. Other cases are Fogelsville & T. Electric Co. v. Pennsylvania Power & Light Co. 271 Pa. 237, P.U.R.1921E, 767, 114 Atl. 822, and Kinder v. Looney, 171 Ark. 16, P.U.R.1926D, 425, 283 S. W. 9.

As to the question of the right of the complainant to have his complaint dismissed, we might state that during the argument on its objections, the Commission asked its attorney whether, irrespective of the question of the jurisdiction of the Commission to proceed further, the complainant desires to have the complaint dismissed. We were told that dismissal is not desired unless it be upon the express condition that the Commission, because of the action taken in said court, no longer has jurisdiction. Therefore, to say nothing of the effect on the defendant asking for affirmative relief before the objections of the complainant were filed, we are unable to dismiss when we are asked to do so on a condition which we cannot and do not approve.

ORDER.

It is therefore *ordered*, that the objections of the complainant

to the further exercise of jurisdiction by the Commission be, and they hereby are, overruled, and that the questions raised by the pleadings filed shall stand for hearing in regular course.

CALIFORNIA RAILROAD COMMISSION.

RE TRACY GAS COMPANY.

[Decision No. 18684; Application No. 13295.]

Security issues — Basis — Revised estimate — Proof of need.

1. A request for authority to issue additional stock because of a revised cost estimate in excess of the estimate on which an original tentative approval of the Commission was based, will be denied in the absence of some proof of the reason and soundness of the change, and authority given only for issues based upon the original estimate, p. 512.

Security issues — Proceeds — Purchase of equipment — Notice to Commission.

2. The Commission must be advised of the party from whom certain equipment is to be bought, its condition, and the circumstances of the sale and its terms, before it will authorize the withdrawal of any utility funds for the purchase, p. 514.

[August 4, 1927.]

APPLICATION for authority to issue certain securities; mortgage bonds approved and additional stock denied.

Appearances: Rufus H. Kimball, for applicant; N. R. Sutherland, for Pacific Gas & Electric Company and Western States Gas & Electric Company.

By the **Commission:**

Supplemental Opinion.

Tracy Gas Company requests permission to exercise the rights and privileges granted it by Ordinance No. 114 of the city of Tracy, and by Ordinance No. 381 of the county of San Joaquin, to issue additional stock ($25,000), to exercise a mortgage and/or deed of trust, and to issue and sell at 90 and accrued interest $100,000 of 6-per cent 20-year bonds, and expend proceeds obtained from the sale of stock and bonds.

[1] By Decision No. 17769, dated December 20, 1926, P.U.R.

1927C, 177, as amended by Decision No. 17902, dated January 12, 1927, and by Decision No. 18498, dated June 10, 1927, the Commission declared that public convenience and necessity required the exercise by Tracy Gas Company of the rights and privileges granted it by Ordinance No. 112, passed by the board of trustees of the city of Tracy on February 3, 1927, and authorized the company to issue and sell $75,000 of stock. In the original petition the company asked permission to issue $100,000 of stock and $100,000 of bonds. In regard to the bond issue, the Commission in Decision No. 17769, *supra,* at p. 182, says:

"It (applicant) has entered into no agreement for the sale of the bonds and submitted to the Commission neither a form of the bond nor a copy of its proposed deed of trust. We feel that it is proper for the company to issue not exceeding $100,000 of bonds to pay in part the cost of its gas plant, provided it can sell enough stock to establish a reasonable equity for the bonds, and that it submit in satisfactory form, a deed of trust. We will not authorize the issue of the bonds until we are furnished with satisfactory information showing that the company has sold at par $50,000 or more of its stock and has on deposit with some bank or banks at least 75 per cent of the selling price of such stock."

Applicant has submitted a statement showing that it has sold $65,000 of the stock and that it has on deposit with the Bank of Italy the sum of $50,000 from the sale of such stock. It has also submitted a copy of its proposed deed of trust and form of bond.

When this Commission authorized the issue of $75,000 of stock (Decision No. 17769) (*supra*), and expressed the opinion that the company should be permitted to issue $100,000 of bonds, it proceeded on the theory that the plant, including all organization and general and miscellaneous expenses, other than cost of selling stock and discount on bonds, would cost $145,121. Applicant now submits a revised cost estimate of $200,000 which includes $17,500 for Commissions to sell stock and $10,000 of bond discount. At the hearing had before examiner Satterwhite on July 30th, no witness familiar with the revised estimate was produced. Because of applicant's failure to produce a witness, we will not

consider the revised cost estimate filed July 19th as part of the record in this proceeding and deny applicant's request to issue $25,000 additional stock, for the reason that no evidence has been submitted to justify such issue.

Applicant has concluded to locate its generating plant outside the city limits of Tracy, and it has, therefore, become necessary for it to obtain a county franchise. The franchise heretofore obtained from the city of Tracy requires the company to use cast iron pipe if it constructed a low pressure system. It prefers, however, not to construct its low pressure distributing system in the city of Tracy with cast iron pipe, and, therefore, has obtained a new franchise, Ordinance No. 114, which gives it the option to use cast iron pipe or steel and wrought iron pipe. Certified copies of both the city and county ordinances have been filed in this proceeding. At the hearing had before examiner Satterwhite, the Pacific Gas & Electric Company and Western States Gas & Electric Company, a subsidiary which also serves gas in San Joaquin county, were represented but did not protest the granting of the requests of applicant, provided that said applicant did not seek permission to operate elsewhere than in the city of Tracy and the territory immediately adjacent thereto.

The Commission by Decision No. 17769, *supra,* as amended, required that all the proceeds obtained from the sale of stock, except such amount as the order of the Commission allows to be expended to pay Commissions and other expenses incident to the sale of the stock, shall be deposited with a bank or banks and expended only as hereafter authorized by the Commission by supplemental order or orders. We believe that the net proceeds which the company will realize from the sale of the bonds herein authorized to be issued, should likewise be deposited with a bank or banks and expended only as hereafter authorized by a supplemental order or orders.

[2] On July 1st Tracy Gas Company requested permission to withdraw $59,671 for the following purposes:

Railway siding from the Southern Pacific line to the proposed gas plant	$1,580.00
Payment for the land, 3 acres, rights of ways, and private roadway	5,000.00
For the drilling and equipping of water well, the pump and electric motor	1,650.00
Concrete foundations for the gas holder, lampblack pit and run, and foundations for all other machinery	7,000.00
For the building of a water reservoir	1,250.00
For the purchase of pipe, 5200 feet 6-inch steel pipe, wrapped and dipped	6,136.00
20,000 feet 4-inch steel pipe W. and D.	13,395.00
25,000 feet 2-inch pipe, also W. and D.	5,810.00
50,000 feet trenching and laying	12,500.00
Cost of welding pipes	4,350.00
Office furniture and equipment, stationery and printing	1,000.00
Total	$59,671.00

Before we will authorize the withdrawal of any money for the purchase of pipe, we desire to be advised from whom such pipe is being purchased, the condition of the pipe (new or second-hand), whether the same is being purchased under competitive bidding, and the terms and conditions of the purchase. The order herein will authorize the withdrawal of $20,480 for the purposes stated in said order.

Applicant on August 3d filed a revised copy of its mortgage and/or deed of trust which is in satisfactory form.

Tracy Gas Company asks permission to sell 6 per cent 20-year bonds at 90 and accrued interest or on a basis of nearly 7 per cent. In our opinion the price at which the company asks permission to sell its bonds is too low and the order herein will authorize the sale of the same at not less than 92½ per cent of their face value and accrued interest.

Note.—Security Issues.

I. Notice, 515.
II. Invalid issues, 516.
III. Purpose 516.
IV. Amount and basis, 516.
V. Stock dividends, 516.
VI. Sale price and interest rates, 516.
VII. Cost of financing, 517.
VIII. Proceeds from securities, 518.
IX. Fees payable, 518.

I. Notice.

The provision of the Nebraska Constitution Art. 10, § 5, that

"the capital stock of public utility corporations or common carriers shall not be increased for any purpose, except after public notice for sixty days, and in such manner as may be provided by law," must be complied with before additional securities can be issued. Re Dundy County Mut. Teleph. Co. (Neb.) Application No. 6562, Feb. 23, 1927.

II. Invalid issues.

The Commission cannot ratify notes which have been issued without its authority; but a new issue may be authorized upon cancellation of the old notes. Re Pioneer Truck & Transfer Co. (Cal.) Decision No. 17253, Application No. 12982, Aug. 23, 1926.

III. Purpose.

A public utility was authorized to issue three new mortgage notes for $10,000 each, payable in annual installments over a period of ten years, to refund a $30,000-note, for the purpose of not having the entire amount fall due at one time. Re Central Mendocino County Power Co. (Cal.) Decision No. 17039, Application No. 12897, July 2, 1926.

IV. Amount and basis.

One public utility taking title to another, which a third company has agreed to purchase at an excessive price, will not be authorized to issue securities in payment to the third company in excess of the fair value of the property; and will be required to stipulate that it will not issue or record on its books any indebtedness to represent the difference between the securities authorized and the excessive price agreed to be paid by the third company. Re Fort Bragg Electric Co. (Cal.) Decision No. 17448, Application No. 13034, Oct. 13, 1926.

V. Stock dividends.

In Re Nuckolls County Independent Teleph. Co. Application No. 6644, March 28, 1927, the company asked that they be allowed to pay dividends out of the net surplus. The Nebraska Commission said that such net income as may remain after paying all proper operating expenses including allowances for maintenance and depreciation may be distributed to the stockholders in the form of dividends at the discretion of the board of directors or stockholders and so long as the rates are reasonable the subscribers are not concerned and the Commission will not interfere.

VI. Sale price and interest rates.

In Re Clear Lake Water Co. Decision No. 18580, Application No. 13763, July 8, 1927, the applicant, a water utility corporation,

asked for authority to acquire certain properties of other similar utilities and to issue certain stocks and 6 per cent first mortgage bonds in payment therefor. The company covenanted not to pay or declare any dividends on stock until there should be deposited with the trustee a sum of money sufficient to provide for the payment of interest to accrue upon the bonds issued and outstanding for a period of three years after the payment of such dividend. The California Commission, in approving the rest of the application, added that it did not think the provision for depositing funds to the bond interest account was sufficiently explicit and stated: "We believe that all earnings of the company, over and above interest and other fixed charges should, until such time as the said interest fund is accumulated, be paid into said fund unless the Commission permits the company to use said earnings for additions and betterments."

In authorizing an issue of first mortgage bonds the California Commission said that if the company issued 6½ per cent bonds it should sell such bonds at not less than 98, or on at least a 6.7 per cent basis. The Commission however had no objections to the company selling a 6 per cent bond on a 6.7 per cent basis or at a sale price at about 93. Re Sutter-Butte Canal Co. (Cal.) Decision No. 18048, Application No. 13532, March 14, 1927.

Five per cent bonds of an electric company were authorized to be sold at 88 rather than at 85. Re Indiana Electric Corp. (Ind.) No. 8881, April 11, 1927.

In Re Northern Indiana Power Co. No. 8954, Aug. 19, 1927, a petition for rehearing to modify a former order of the Indiana Commission as to the sale of securities by the petitioner was denied when no showing was made why the common stock therein referred to should be sold at less than par, it appearing that it was to be all taken by the parent company.

A prosperous gas company should sell 6 per cent preferred stock at not less than 87 rather than 86. Re Northern Indiana Pub. Service Co. (Ind.) No. 8701, March 18, 1927.

Stock discount on the sale of preferred stock was required to be neither capitalized nor charged to operating expenses, but to be accounted for as required by the prescribed uniform system of accounting. Re United Teleph. Co. (Ind.) No. 8403, March 29, 1926.

VII. Cost of financing.

An amount not exceeding 2 per cent of the par value of stock authorized to be sold was allowed by the California Commission to pay commissions and expenses incident to such sale. Re Coast Counties Gas & E. Co. Decision No. 17993, Application No. 13491, Feb. 11, 1927.

VIII. Proceeds from securities.

In Re Nuckolls County Independent Teleph. Co. Application No. 6644, March 28, 1927, the Nebraska Commission authorized a sale of common stock of $15,000, the proceeds to be used in purchasing the Hardy Telephone Company and to defray costs of additions and betterments thereto. The Commission found the company to be sound, efficiently managed, and charging reasonable rates on its investment and that the proposed purchase would fit in well with the established system and result in better service to subscribers of both lines.

IX. Fees payable.

The maturity date of second mortgage notes, and the time for payment of annual installments, need not be fixed so that several months will elapse between such date and the date on which payment must be made of the interest and sinking fund on first mortgage bonds, where monthly deposits will be made to accumulate funds to make payments on the notes. Re Central Mendocino County Power Co. (Cal.) Decision No. 17039, Application No. 12897, July 2, 1926.

COLORADO PUBLIC UTILITIES COMMISSION.

RE MONTEZUMA COUNTY TELEPHONE COMPANY.

[I. & S. Docket No. 77, Decision No. 1427.]

Discrimination — Telephones — Free interexchange — Fair return.

1. Irrespective of whether a telephone utility is making a reasonable return on its investment without toll charges, the rendition of free interexchange to a comparative few at the expense of all subscribers is a discrimination which should not be tolerated where the exchanges are situated in two separate towns constituting separate business and social communities, p. 520.

Rates — Telephones — Business development from free interexchange.

2. The fact that certain business conditions have grown up as a result of a long period of unlimited and free interexchange between two neighboring towns, cannot prevent the establishment of a toll rate which is reasonable, upon proof that the former practice was discriminatory, p. 523.

Return — Telephones — Remedy for excessive return — Free service.

3. Where the inauguration of a toll charge would yield an excessive return, the remedy is in a general reduction of rates and not in free interexchange service, p. 526.

Rates — Reasonableness — Toll charge — Uniformity — Telephones.

4. In the absence of other evidence as to the reasonableness of a proposed toll charge, it will be presumed fair if it is the usual and customary one made in similar territory under like conditions, p. 526.

Discrimination — Telephones — Free interexchange.

Discussion of whether free interexchange between two neighboring towns is a discrimination against other pairs of communities so situated on a different telephone system, p. 525.

[September 21, 1927.]

APPLICATION to establish toll rate between two exchanges 13 miles apart; approved.

Appearances: John G. Russell, Dolores, and Leroy J. Williams, Denver, for applicant, the Montezuma County Telephone Company; John J. Downey, Cortez, for protestants, the Montezuma Valley Irrigation Company, the Cortez Chamber of Commerce, and the towns of Cortez and Dolores; A. J. Waldron, Dolores, for protestants, himself and subscribers in the town of Dolores.

By the **Commission:** On May 17, 1926, there was filed with the Commission by the Montezuma County Telephone Company, a toll rate schedule entitled Colorado P. U. C. No. 1, original sheet No. 3-B, to become effective July 1, 1926, by which there was to be made effective between the exchanges of Cortez and Dolores, toll charges as follows:

Day Rate—10 cents, limit five minutes, overtime 2 cents per minute.

Evening Rate (7 to 9)—5 cents, limit five minutes, overtime 1 cent per minute.

On June 11, 1926, the Cortez Chamber of Commerce filed its protest by J. G. Dunning, Secretary. On the same day A. J. Waldron, Dolores, filed an informal written protest on behalf of subscribers on the exchanges at both Cortez and Dolores. On June 16, 1926, the Montezuma Valley Irrigation Company, filed its objections. On October 7, 1926, there were filed the written objections and protest by a large number of subscribers of the company.

On June 15, 1926, the Commission suspended the effective

date of the proposed rates for ninety days. Thereafter suspension as made.

Pursuant to notice duly given the cause came on for hearing and was heard in the town hall in Dolores, Colorado, on October 11, 1926. The Commission made its order on February 10, 1927. On March 7, 1927, the protestants filed their application for a rehearing. Argument of this application was heard in the hearing room of the Commission in Denver on August 23, 1927, at which time and place the only person appearing before the Commission was the Denver attorney for the Montezuma County Telephone Company. The attorney for the protestants submitted the case on the brief which he had theretofore filed.

The telephone company furnishes telephone service to the towns of Dolores and Cortez and to the intervening and surrounding country. It maintains and operates an exchange in each of the two towns. The towns are separated by a distance of thirteen miles. There are about an equal number of subscribers on each exchange. Up until the time of the filing of the tariff in question, no charges had been made for toll calls between the two exchanges. The town of Cortez has no railroad connections. The nearest railroad point is Dolores. The evidence showed certain business relations between the two towns but it wholly failed to show that the business and social relations of the two communities are such as to constitute them one community. It did show that a very large majority of the telephone conversations carried on between the subscribers of these two exchanges are by a comparatively few people. Two parties, one calling the other, made a total of 67 calls in one test period of two weeks. An engineer for the Montezuma Valley Irrigation Company testified that in his opinion the toll service rendered would cost that company at least $600 per year.

Two points were made by the protestants. One is that no showing had been made that the present income of the company is not sufficient without adding the toll charges. The other is that business relations had been built up on the strength of the free service between the two towns and that, therefore, it would be inequitable now to impose the toll charges.

[1] Irrespective of the question whether the company is mak-

ing a reasonable return on its investment without the toll charges, the rendition of this service to a comparatively few at the expense of all of the subscribers, is a discrimination which should not be tolerated where the exchanges are situated in two separate towns constituting separate business and social communities. It is true that the subscribers on an exchange receiving only local exchange service do not make the same use of the telephone—some will make and receive a great many more calls than others, but in most cases, particularly in small communities, it is impracticable to meter such service. But, as has been stated by the Wisconsin Railroad Commission in Re Wisconsin Teleph. Co. P.U.R. 1926C, 546, there must be some limit to the extent to which this flat rate service should be extended. A fairly clear distinction exists between service rendered a town and its immediate territory and toll service between two separate and distinct towns and their adjoining territories. On this point we quote at some length from decisions in other cases.

"Turning to the question of discrimination we have the argument presented in this case that the discrimination is really no greater than that which exists in any city where flat rate users who are subscribers for exchange service use service in very different quantities. The same condition of course exists in every exchange, and unless service is reduced to a measured basis so that each subscriber can pay exactly for the units which he uses, this element of apparent discrimination is bound to exist. It is a discrimination, however, due rather to the inability of the company to place in effect a schedule of rates which will entirely remove such discrimination, or one due to an acceptance of the principle that there should be and may properly be a difference in charge for the same amount of service or a different amount of service rendered for the same charge. Unquestionably two business subscribers paying the same amount for their exchange service may receive widely different amounts of service. Metering of telephone business in small exchanges is uneconomical and the results produced, particularly when we recognize the fact that for any subscriber a large part of the cost of service is fixed, do not warrant the expense. In other words, the discrimination which exists in exchange flat rates can hardly be

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considered an unreasonable discrimination in view of all the facts. Whether this can be extended so that we may say that toll service should be placed on a flat rate basis, is the question here. Obviously there must be some limit to the extent to which this flat rate service can be extended. In this state generally cities situated as are Chippewa Falls and Eau Claire can secure their telephone connection only on a toll rate basis. If it is not discriminatory, and unjustly so, as between subscribers in Eau Claire and Chippewa Falls to permit some to receive large amounts of interexchange service at the expense of others, it must follow that it would not be discriminatory to permit all cities at similar distances to receive this service on a flat rate basis. If this is the case, what is to prevent the extension of that flat rate service to cities situated at distances of twenty or thirty or a hundred miles from each other? At what point can any line be drawn between that which should be handled on a flat rate basis and that service to which message rates should apply? The discrimination which exists in the ordinary exchange due to parties paying the same amount receiving different quantities of service is a discrimination which can hardly be held to be unjust because its elimination is uneconomical and not in line with general practice. On the other hand, the elimination of the discrimination which unquestionably exists in these exchanges between parties using large amounts of intercity service and those using small amounts can be accomplished by placing in effect a standard system of handling the business which is effective in practically all other similar situations, and, it might be added, has been subject to very little complaint. Under these conditions we can hardly hold that the elimination of this discrimination will work a material hardship. Also it seems to us that without any question there is an unjust discrimination in this case, unjust because of the great quantities of service which some parties receive which are paid for by others, and unjust also because its continuance is unnecessary and the remedy for it lies in the adoption of a system of handling the business which is almost universally in effect." Re Wisconsin Teleph. Co. *supra,* at pp. 550, 551.

"Telephone companies operating both exchanges and toll lines must necessarily place a limitation upon the area served by the

exchange, without charge other than the usual subscribers' exchange charge. The limitation can properly be the town or city and adjacent territory or community. The town of Glendale and the surrounding territory is one community, and the city of Phoenix and the surrounding territory is another community. We cannot eliminate distance and declare the Glendale and Phoenix territory as one community. . . . An investment is necessary in toll lines and equipment separate and apart from the investment in plant equipment and lines for the local exchange service and, while the subscribers are charged for the use of the telephone, the rental covers the exchanges, and not the toll services. At the present time the telephone company has no revenue from the toll service between the Glendale and Phoenix exchanges, notwithstanding the fact that they have a large investment in toll lines and equipment in order to render the service. Toll lines and exchange service are necessarily separate services." Re Mountain States Teleph. & Teleg. Co. (Ariz.) P.U.R.1917E, 248, 251.

"There are two ways of charging for a service of this kind; by one method the cost of furnishing the service is distributed over all of the subscribers of the exchange; and by the other the subscribers who actually use the service pay the cost of furnishing the same. There is no such thing as free service and the subscriber must either pay for same in the form of an addition to his monthly bill for local exchange service, or on a measured service or toll basis. It is, therefore, obvious that in order to eliminate discrimination the subscribers should be required to pay for the toll service as it is used. For this reason the establishing of a toll rate between the exchanges involved herein, places the cost of the service upon the subscribers who use it and eliminates unjust discrimination." Ogle v. Home Teleph. Co. (Ill.) P.U.R. 1924D, 308, 312.

[2] In answer to the argument that business, social, and other relations have been built up and established on the basis of free toll service, we adopt the following language found in Re Wisconsin Teleph. Co. *supra,* at pp. 551–553.

"How serious the effect on business may be if a toll rate is established, we, of course, are not in a position to judge. If

we may place full reliance on the agruments offered on behalf of the cities and of their commercial organizations, the results would be extremely serious. Nevertheless, we have the situation in a number of other instances in which cities very similarly located receive their telephone service on a toll rate basis and in which business, social, and other relations have adapted themselves readily to that basis. The situation may be somewhat aggravated here by the fact that for a long time past no toll rates have been in effect, and that conditions have adjusted themselves to that basis. However, we question whether we can hold that because certain business conditions have grown up as a result of this unlimited service, we can prevent the establishment of a rate which is reasonable in and of itself and of a principle of administering the telephone business which is recognized as reasonable and proper in practically all other cases; nor do we believe that over a period of time there will be any serious disruption. Some inconvenience there is bound to be as a result of any change. Suppose, for example, that water service in one of these cities were supplied on a flat rate basis, and an individual customer because of receiving this service without reference to the amount of water that he required, used large quantities of water for unusual uses in his establishment, would the fact that placing that customer on a meter basis would disrupt his business relations or inconvenience him in the conduct of his business be any justification for permitting him to continue to receive that which he did not pay for, and which must be paid for by other customers? We think the only answer must be a negative one. . . .

"The business man who perhaps makes 100 or 200 calls per month between these exchanges could not and would not under such conditions expect the bulk of the residence users who made little or no use of this service to pay his bill. We fail to see any distinction between that case and the one which we have here so material as to effect the conclusion. It is true that in this case the exchanges are owned by the same company, and it is also true that there exists a physical connection. So far as the relation between customers is concerned there is no distinction. So far as the principle which should govern in establish-

ing the basis for meeting the cost of this connection we think the situations are identical. In other words, we can only conclude that where a connection of this kind is to be continued, its continuance is not for exchange purposes and the cost of such continuance should be set by toll rates paid by those who benefit from the service. The fact that there is in practically every schedule of exchange rates some element of discrimination and that some parties receive a service for which they do not fully pay is not an adequate argument for extending this principle into the toll field where it is unnecessary in practice to have such discriminations exist.

"We think, therefore, that as a matter of law the company may establish a toll rate providing the rate established is not unreasonable."

To the same effect is the recent case of Re Wisconsin Teleph. Co. (Wis.) P.U.R.1927D, 193.

The further argument was made by the telephone company that in rendering free toll service to the patrons of these two exchanges a discrimination is being made against the patrons of all other exchanges in the state similarly situated, even though they be on different telephone systems. A case cited in support of this contention is Re Mountain States Teleph. & Teleg. Co. *supra*, at pp. 251, 252, in which the Arizona Corporation Commission said:

"To permit free toll service between the exchanges of Glendale and Phoenix would be placing a burden on some other community or exchange within the state not enjoying such a privilege, and the records show that there is no other community or exchange within the state having such privilege. It cannot be denied that toll service between exchanges is a valuable service, and that it should be charged for at reasonable toll rates. . . .

"Free toll service between the Glendale and Phoenix exchanges is a discrimination against every other exchange located within the state of Arizona not having a like privilege; and it is apparent that there are other exchanges within the state that would be entitled to a similar service in the event that we allowed a free service between the town of Glendale and the city of Phoenix."

Whether the rendition of a free service of this kind by one

company is an unlawful discrimination against other communities similarly situated paying for such service on a wholly different system, as may be the case, we do not need to decide, for the reason that there is an unlawful discrimination against some of the subscribers of this company in favor of others. One form of unlawful discrimination is sufficient to condemn the practice without more.

[3] We, therefore, conclude, irrespective of whether the company is now earning a sufficient return on its investment without adding a new source of revenue, that this free toll service is a discrimination and a proper charge should be made therefor. If the result thereof should be an excessive return on its property, the remedy would be the lowering of rates and not the rendering of this service without charge.

[4] The contention of the protestants went more to the question as to whether there should be any toll charge at all than to the question whether the particular charges proposed were reasonable, but we believe that the question of the reasonableness of these charges has fairly been raised. Unfortunately, no satisfactory evidence of the value of the company's assets has been offered. But the toll charges are the usual ones made in similar territories between exchanges situated at the same distance apart.

Therefore, borrowing the language of the Wisconsin Railroad Commission, we conclude generally, having reached the conclusion that there is an unlawful and unjust discrimination in the rendition of such service without charge, that such disruption of business and social relations as the protesting parties fear, even if it should materialize, which we doubt, is not a basis on which the Commission can refuse to authorize the establishment of the toll rates, and having further concluded that the company has a right to establish toll rates, and that the rates which it has proposed are reasonable, we can only reach the conclusion that this proceeding should be discontinued.

Quite a little evidence was devoted to the question as to what exchanges the various subscribers in the two communities involved should be attached. We shall assume for the present that such connections will be made as are reasonable and in accord with the best telephone practice, the company giving due consid-

eration to the present situation and needs of the subscribers and their desires to elect flat rate service from one exchange or the other, but not from both, even though this may possibly entail the addition of a mileage charge to those subscribers who are not reasonably within what might properly be called the exchange area of the exchange on which they desire their connection.

The Commission further concludes that the former decision and order should be withdrawn.

COLORADO PUBLIC UTILITIES COMMISSION.

RE STANLEY POWER COMPANY.

[Application No. 892, Decision No. 1486.]

Certificate of convenience and necessity — Necessity — Operation prior to regulation.

1. A certificate is not required retroactively approving and authorizing construction which took place prior to an act requiring a certificate for the same but applying only to construction made after the act became effective, p. 528.

Certificates of convenience and necessity — Consent of other governmental bodies — Power utility.

2. A preliminary order after a showing of the necessary proof of convenience and necessity will be issued declaring that a certificate will be granted after the applicant has obtained from the municipality a franchise, permit, ordinance, or other authority where an act, (C. L. of Colorado, 1921, § 2946 (c)), makes the procurement of such authority a condition precedent to the valid issuance of such a certificate, p. 529.

[November 7, 1927.]

APPLICATION of power utility for a certificate of convenience and necessity; preliminary order for certificate issued.

Appearance: Ab H. Romans, Loveland, for the applicant.

By the **Commission:** On May 10, 1927, there was filed in the office of the Commission an application by the Stanley Power Company, a corporation, for a certificate of public convenience and necessity to operate within the town of Estes Park and the adjacent territory. The matter was set for hearing and was heard in the school house in the town of Estes Park on August

30, 1927. No appearance was made at the hearing other than that of the applicant, although the town of Estes Park was duly notified of the application and of the hearing, and the mayor thereof testified.

The evidence shows that for a number of years the applicant has been serving the inhabitants of the town of Estes Park and vicinity and a number of tourist hotels with electricity and power. This service has covered an area extending about six miles east, two miles north, six miles west and four miles south of the town. The company has an investment of approximately $100,000 and a plant that is capable, with proper adjustments, of substantially increased capacity. The service has been satisfactory and dependable.

Mr. Samuel Service, the mayor of the town, testified that the town had never granted the applicant a franchise, permit, ordinance, vote or other authority, although some such action had been considered. The statute gives this Commission the authority to issue a certificate authorizing "the construction of a new facility, line, plant, or system or of any extension of its facility, line, plant, or system" and requires that such a certificate shall be secured before the public utility shall begin the construction of a new, or the extension of an old, facility, line, plant or system. The statute (C. L. of Colo., 1921, § 2946 (b)) further provides that "No public utility shall henceforth exercise any right or privilege under any franchise, permit, ordinance, vote, or other authority hereafter granted . . . without first having obtained from the Commission a certificate that public convenience and necessity require the exercise of such right or privilege."

[1] From a reading of the application and a consideration of the testimony, we do conclude that the applicant is not seeking a certificate retroactively approving and authorizing the construction which took place in 1909. Moreover, there would be no need of such certificate because the act applies to construction made after the act and not that already made when the act became effective. We cannot grant a certificate authorizing the exercise of a right or privilege under any franchise, permit, ordi-

nance, vote, or other authority because no such franchise, permit, ordinance, vote, or other authority has been granted.

[2] There are no other provisions in the statute by which this Commission has jurisdiction to issue a certificate. It may be that the applicant will desire "to exercise a right or privilege under a franchise, permit, ordinance, vote or other authority which it contemplates securing but which has not as yet been granted to it," (C. L. of Colo., 1921, § 2946 (c)). In such an event the statute provides that the public utility "may apply to the Commission for an order preliminary to the issue of its certificate." The Commission will, therefore, treat the application as such and will give the applicant a reasonable time in which to secure a "franchise, permit, ordinance, vote or other authority."

The Commission finds that the public convenience and necessity requires the making of an order preliminary to the issue of a certificate declaring that it will hereafter upon further application herein, and the making of necessary proof, issue the desired certificate, upon such terms and conditions as it may designate, after the applicant has obtained and made effective the franchise, permit, ordinance, vote, or other authority.

ILLINOIS COMMERCE COMMISSION.

L. S. MAYER

v.

ILLINOIS NORTHERN UTILITIES COMPANY.

[No. 17531.]

Rates — Electric refrigerator — Off-peak consumption — Discrimination.

Rates for current used by electrical refrigerators are discriminatory if higher than rates for ordinary domestic heating and cooking devices, the off-peak advantage being more pronounced and the load factor better by reason of the more continuous use of energy.

[October 5, 1927.]

COMPLAINT against excessive rates charged by electric util-

ity for current consumed by electric refrigerators; rates reduced.

By the **Commission**: On July 21, 1927, L. S. Mayer filed with the Commission a complaint against the Illinois Northern Utilities Company relative to rates for electric refrigerator in Keithsburg, Illinois. The matter came on for hearing at the office of the Commission in Chicago on September 13, 1927, at which hearing both parties were represented.

The complainant alleges that there is no more justice in attaching a motor driven device to the light circuit than if it were attached to a heating circuit; that the justification for a heating rate lies in the fact that much of the consumption is off-peak; that the mechanical refrigerator is more nearly an off-peak consumer than the ordinary domestic heating and cooking device; and that the use of electric refrigerators is seriously curtailed by the high rate for electric energy under the present rules and regulations of the Illinois Northern Utilities Company.

The Illinois Northern Utilities Company offered no evidence in this case, merely stating that the application of the rate schedule under complaint is in accordance with the terms and conditions of the schedule. No proof was offered to show that the load produced by domestic electric refrigerators is less attractive than that produced by the use of domestic heating appliances.

It would appear to the Commission that the load occasioned by electric refrigerators is more of an off-peak load than that produced by the use of domestic heating and cooking devices, that the load factor is better by reason of the more continuous use of energy, and, therefore, it is at least as desirable as the heating and cooking load. Certainly there is nothing in this record to show that the energy consumed by an electric refrigerator should be charged for at a higher rate than the energy consumed by the ordinary domestic heating and cooking devices. The Commission, therefore, finds:

(1) That from the facts of record in this case the rates for domestic electric refrigeration as charged by the respondent

should be no higher than the rates charged for domestic cooking and heating; and

(2) That, therefore, the complaint in this case is sustained.

It is therefore *ordered* that the Illinois Northern Utilities Company shall file a supplement to its present rate schedule which shall make optional service to electric refrigerators on the electric heating and cooking rates of the above named company if any consumer so desires the service.

INDIANA PUBLIC SERVICE COMMISSION.

RE INDIANA SERVICE CORPORATION.

[No. 481-M.]

Service — Abandonment — Unprofitable operation — Motor bus line.

A corporation should be authorized to abandon the operation of a motor bus line when the minimum transportation loss per mile has been 5.7 cents per bus mile and the maximum has run as high as 27.6 cents per bus mile, where there is railroad and traction transportation over the entire length of the route, and the bus will probably never be a paying proposition.

[May 20, 1927.]

APPLICATION by a bus corporation for authority to discontinue service; application granted.

Appearance: Barret, Barret, Peters & McNagny, for petitioner; no other appearance.

Harmon, Commissioner: On March 24, 1927, the Indiana Service Corporation filed with the Public Service Commission of Indiana its petition to discontinue service between Fort Wayne and Marion, Indiana, which petition, omitting the caption and signature, is in words and figures following, to wit:

"Comes now Indiana Service Corporation, applicant herein, and respectfully shows to your honorable Commission:

1. That it is now and since January 1, 1926, has been operating a motor bus line for the carriage of passengers between Fort Wayne and Marion, Indiana, under a certificate of convenience and necessity, No. 481-M, originally issued to John

Donzelli, and transferred and assigned to applicant herein by order of your Commission, dated December 31, 1925.

2. That the following is a statement of the revenues and expenses of said bus line, commencing January 1, 1926, and ending January 31, 1927, showing the average earnings and expenses of applicant in the operation of said line, together with the revenues and expenses per bus mile:

1926.	Mileage.	Earnings.	Expenses.	Loss.	Rev./M.	Exp./M.
Jan.	6,346	$428	$975	$547	6.7¢	15.3¢
Feb.	9,215	644	2,018	1,374	6.7	21.9
Mar.	5,329	322	1,243	921	5.8	23.3
Apr.	10,402	603	1,818	1,215	5.7	17.5
May	10,515	658	1,895	1,237	6.3	18.0
June	10,491	635	2,184	1,549	6.2	20.8
July	10,685	631	2,422	1,791	6.0	22.7
Aug.	10,703	652	2,502	1,850	7.1	23.4
Sept.	10,096	795	2,247	1,452	7.8	22.3
Oct.	10,706	790	2,769	1,979	7.4	25.9
Nov.	10,526	652	2,417	1,765	6.2	23.0
Dec.	10,091	673	2,781	2,108	6.7	27.6
Total	115,115	$7,483	$25,271	$17,788	6.5	21.9
1927						
Jan.	10,382	600	2,223	1,623	5.8	21.4

"That as shown by said statement applicant's loss in the operation of said line for the year 1926 was $17,788 and the loss in said operation during January, 1927, was $1,623. That the average operating expense per bus mile during the year 1926 was $21\frac{9}{10}$ cents and the average revenue per bus mile was $6\frac{5}{10}$ cents, resulting in a loss to applicant of $15\frac{4}{10}$ cents per bus mile during all of said period.

"3. That in the opinion of applicant there is not sufficient demand by the travelling public for motor bus transportation between Fort Wayne and Marion, Indiana, over the route above described, and the cities and towns intermediate thereto, to warrant the continuance of said service over said route, and that in the opinion of said applicant the public convenience and necessity no longer demands or requires a further continuance of said bus line.

"4. The applicant further shows that it has suffered a serious financial loss by the operation of said bus line and that a further continuance thereof will cause it a still greater financial loss, and that it is in its opinion impossible to operate said

motor bus line except at a continuous loss of more than $20,000 per year.

"*Wherefore,* applicant prays that your honorable Commission make and enter an order authorizing it to abandon the operation of the motor bus line described between Fort Wayne and Marion, Indiana, and for all such other and further relief as may seem right and proper."

Notice was duly given to all interested parties that the said petition would come on for hearing at the city of Fort Wayne in the court house, on the 19th day of May, 1927, at 9 o'clock A. M. of said day. Pursuant to said notice, the hearing was had in the assembly room of the court house in said city.

The evidence disclosed the fact that the said motor bus line served the following cities and towns of Indiana, to wit: Ossian, 700 population, Bluffton, 5,000; Montpelier, 3,000; Fiat, 100; Petroleum, 100; Roll, 100; Marion, 25,000; Fort Wayne, 100,000; and also disclosed the fact that all of said cities and towns were served by both railroad and traction transportation over the entire length, the traction transportation being as often as one and one half hours throughout the day and part of the night.

The evidence showed also that for a period of sixteen months, beginning with January, 1926, and ending with April, 1927, the net loss for operating such bus line has been as follows: $22,742, or an average monthly loss during the sixteen months of $1,421.26.

The evidence also disclosed the fact that the minimum transportation loss per mile had been 5.7 cents per bus mile and that the maximum has run as high as 27.6 cents per bus mile.

The evidence also showed that the busses used by said company were of a superior parlor type, 20-passenger, type and that a schedule had been maintained consistently since the 1st of January, 1926. Also that the bus would probably never be a paying proposition when the competition of both traction line and railroad was taken into consideration. The Commission is, therefore, of the opinion that the service should be discontinued and that public convenience and necessity no longer requires the operation of said bus line.

It is therefore *ordered* by the Public Service Commission of Indiana that the Indiana Service Corporation be authorized as empowered to abandon the operation of its motor bus line between the cities of Fort Wayne and Marion, Indiana, and through the towns and cities of Ossian, Bluffton, Montpelier, Fiat, Petroleum, and Roll, and to make such abandonment on the 5th day of June, 1927, provided, however, that ten days' notice by publication in such daily newspapers and one publication in a weekly newspaper published in the towns along the route served by said bus line, of its intention so to do.

INDIANA PUBLIC SERVICE COMMISSION.

JOSEPH H. GREGG et al., Doing Business Under Name of Blue & Gray Bus Line, and Hoosier Transportation Company, Incorporated

v.

CITY OF TERRE HAUTE.

[No. 785-M.]

Commissions — Power to determine validity of ordinance — Alleged traffic regulation.

The Commission has power to determine the validity of a city ordinance prohibiting automobiles for hire operating over a regular route from stopping to receive or discharge passengers on any street having street cars on it at that point, or forbidding any vehicle for hire to stand longer than five minutes at any one spot within the congested districts, notwithstanding the contention of the city that such ordinance is a regular traffic regulation enacted in the exercise of its authority over its highways.

[November 18, 1927.]

PETITION to have city ordinance declared invalid; motion to dismiss overruled.

Ellis, Commissioner: On August 15, 1927, Joseph H. Gregg and Andrew Carli, a partnership doing business under the firm name and style of the Blue and Gray Bus Line, and the Hoosier Transportation Company, Incorporated, filed a petition with the Public Service Commission of Indiana requesting said Commission to make an order declaring § 8 of a certain ordinance

of the city of Terre Haute, known as general ordinance No. 5,1926, to be illegal, invalid, and void. Said petition is made a part hereof by reference. As shown by the petition, said § 8 of said ordinance is as follows:

"(Passenger Carrying Vehicles—Other than Street and Interurban Cars.) No person, firm or corporation operating any jitney, city bus, or interurban bus for hire, shall stop to receive or discharge any passengers upon any street, avenue, or roadway, within said city, at any point thereon, upon which street, avenue, or roadway there is located any street car track or tracks, upon and over which tracks street or interurban cars are regularly operated.

"No street car, interurban car or vehicle for hire, shall remain standing on any street within the congested district for the purpose of receiving or discharging passengers for a period exceeding five minutes at any one time.

"Provided, that none of the provisions of this section shall apply to any taxicab, or owner or operator thereof, when such taxicab is operated only upon a specific call by telephone or otherwise under a specific contract for hire, from a public or private garage or station maintained for the purpose of receiving such calls, and the destination of which taxicab is wholly under the direction of a passenger or passengers transported therein and the route of which is over any street or streets available for travel thereto; nor any such vehicle, nor the owner or operator thereof, when such vehicle is operated by a hotel owner in the conveyance of guests between such hotel and any railroad or interurban station."

On October 7, 1927, the city of Terre Haute filed a motion to dismiss the petition. Said motion, omitting caption and signatures, is as follows:

"Comes now the city of Terre Haute, Indiana, respondent in the above entitled cause now pending before the Public Service Commission of Indiana, and respectfully moves the said Public Service Commission to dismiss said petition for each of the following reasons, separately and severally, to wit:

"1. The Public Service Commission of Indiana has no jurisdiction or right to hear or determine the matters and issues

presented in petitioners' petition or to grant the relief prayed therein for each of the following reasons, separately and severally, to wit:

"a. Petitioners seek to have the Public Service Commission of Indiana to declare illegal, invalid, void, and unenforceable § 8 of General Ordinance No. 5,1926, passed on February 4, 1927, by the Common Council of the city of Terre Haute, Indiana, and set out said section in full in the petition. Said section of said ordinance is clearly a traffic regulation and as such is a matter over which the city of Terre Haute, by its common council, has exclusive jurisdiction and control.

"b. The ordinance and section thereof sought to be held invalid, was enacted under authority conferred by §§ 53, Clause 31, and 267 of the Municipal Code of 1905, and being §§ 10284, clause 31, and 11186, respectively, of Burns Revised Statutes of Indiana, of 1926, which power has been by the legislature of the state specially delegated to the common councils of cities and which power has never been recalled by the state legislature. This power has never been imposed in the Public Service Commission of Indiana. In fact, Chapter 46, Acts of 1925, p. 138, by which the Public Service Commission of Indiana was given jurisdiction over motor vehicles operated as common carriers, by § 10 thereof, specifically provided that said act should not operate to deprive public authorities of any jurisdiction they then had, or which might thereafter be conferred upon them over public highways of the state. (City streets are a part of the public highways of the state.)

"c. By Chapter 213, Acts of 1925, p. 570, and § 45 thereof, being the general motor vehicle regulation act, and the amendment of § 45 thereof, Acts 1927, p. 721, the power of cities to pass ordinances to regulate motor trucks and motor driven commercial vehicles, and the making and enforcing of traffic regulations, other than those affecting rates of speed, was specifically and expressly declared to remain in such cities. (Said Chapter 213, having been enacted at the same session and subsequent to the enactment of Chap. 46 (Acts 1925).)

"d. The right of local self-government, or home rule, is involved and to the extent of the regulation of traffic of motor

busses on city streets, would be swept aside if the Public Service Commission were to proceed to the determination of the issues and matters presented by the petition herein.

"e. The Public Service Commission of Indiana has never adopted rules and regulations for the governing and regulating of the operation of motor busses over city streets but has consistently held that such matters were for the local authorities, the power of the Commission being limited to the matter of determining the propriety of granting certificates of convenience and necessity, rates, the quality and character of service to be furnished or rendered by the utility. (Opinion of Public Service Commission of Indiana, approved Nov. 27, 1925, in South Side Motor Coach Co. v. Beech Grove).

"f. Under § 110 of the Shively-Spencer Utility Commission Act the Public Service Commission may review city ordinances when it is alleged that the same are unreasonable as to effect upon quality and character of the service to be rendered or furnished. Petitioners herein do not seek redress because the quality or character of service rendered or furnished is affected.

"g. It is the law in Indiana, so declared by the supreme court of the state, that ordinances and sections thereof of the same import as that herein involved, are reasonable. (Frick v. Gary, 192 Ind. 76, P.U.R.1922D, 708, 135 N. E. 346; Denny v. Muncie, 197 Ind. 28, 149 N. E. 639).

"h. The reasonableness of an ordinance passed by a municipality under authority expressly delegated to it by the state legislature cannot be questioned outside of the common council enacting it.

"i. The powers of the Public Service Commission are statutory and must be strictly construed, and do not extend to matters not expressly included in the statute creating the Commission and defining its powers.

"2. At the time certificates of convenience and necessity were granted petitioners or their predecessors, there was in full force and effect in the city of Terre Haute, Indiana, the following regulation, being § 8 of General Ordinance No. 6,1924, passed by the Common Council of the city of Terre Haute, Indiana, on the 15th day of January, 1925, to wit:

XUM

"Section 8. (Passenger Carrying Vehicles—Other than Street and Interurban Cars) No person, firm, or corporation operating any jitney city bus or interurban bus for hire, shall receive or discharge any passengers upon any street, avenue or roadway, at any point thereof, upon which there is located any street car tracks or track, upon and over which street or interurban cars are regularly operated. . . ."

"The portion of § 8 of General Ordinance No. 5,1926, herein sought to be declared unreasonable, is a re-enactment in practically the same words and in the same import as the above quoted portion of § 8 of General Ordinance No. 6,1924. In accepting certificates of convenience and necessity while such regulations were in full force and effect, petitioners are estopped from now attempting to have the same set aside as unreasonable. Such regulations have become a part of their contract or franchise from the Public Service Commission.

"*Wherefore,* said respondent city of Terre Haute, Indiana, respectfully prays that the Public Service Commission dismiss the petition herein for each of the above reasons, separately and severally."

The Commission heard oral arguments on the motion to dismiss the petition on November 4, 1927, at which time all parties were represented by counsel.

The Commission, having carefully considered the arguments, is of the opinion that under the provisions of § 110 of the Public Service Commission Act, it has jurisdiction in this cause. The section of the ordinance complained of, in the opinion of the Commission, applies solely to a certain class of motor vehicles declared to be public utilities by § 1—Chapter 46, Acts 1925. The motion to dismiss the petition, therefore, will be overruled.

P.U.R.1928A.

MICHIGAN PUBLIC UTILITIES COMMISSION.

CADILLAC-SOO LUMBER COMPANY

v.

DULUTH, SOUTH SHORE & ATLANTIC RAILWAY COMPANY et al.

[D-2230.]

Procedure — Informal docket — Nature.

1. The informal docket of the Michigan Commission is informal only in respect to the form of pleadings and the character of the hearing, p. 540.

Reparation — Powers of Commission — Informal docket.

2. The Commission has authority to handle reparation matters in an informal manner, p. 540.

Reparation — Time limitation — Informal complaint.

3. A complaint asking reparation is seasonably filed when within the two-year period designated by § 10–G, of Act 300, Public Acts of 1909 of Michigan, as amended; the claim for reparation is filed with the Commission and acknowledged although the Commission may have been requested to place the matter upon the formal docket after the expiration of the time limitation, p. 541.

[May 2, 1927.]

COMPLAINT asking reparation for alleged overcharges on a freight shipment; reparation ordered.

By the **Commission:** This matter is before us upon complaint filed by the Cadillac-Soo Lumber Company alleging that the transportation charges assessed upon 57 carloads of charcoal moving from Sault Ste. Marie, Michigan to Detroit, Michigan during the months of September, October, November, December, 1923, and January, February, March, April, May, June, July, August, 1924, were unreasonable, unjustly discriminatory and unduly prejudicial. Complainant seeks damages by way of reparation in the amount of $1,156.20.

The proper rate applicable upon the shipments was a 6th class rate of 29 cents per hundred pounds, minimum weight 24,000 pounds, as authorized by agent Boyd's tariff M. P. U. C. No. 97. Subsequent to the movement of the shipments herein involved defendants published a rate of 22½ cents per hundred pounds, minimum weight 26,000 pounds, applicable to the transporta-

tion of charcoal, carloads, from Sault Ste. Marie, Michigan to Detroit, Michigan, which became effective August 21, 1924, in D. S. S. & A. tariff M. P. U. C. No. 1365. Damages are sought upon the basis of the difference between the rate as charged and the one subsequently established.

Defendants raise the question of this Commission's jurisdiction at this time to entertain the complaint and pass upon the issues involved, because it was not seasonably filed, that is, the complaint was not filed with us within two years after the delivery of the shipments at destination, as provided in § 10–G, Act 300, Public Acts of 1909, as amended. It is the contention of defendants that the formal complaint filed with us on August 27, 1926, is a new complaint and that there is no statutory provision for submitting informal complaints or the tolling of the statute of limitation upon informal complaints pending the filing of formal complaints.

It is true that we cannot delegate to ourselves any authority beyond that granted by law, and the only provision of the statute relating to matters of this kind is found in § 10–G of Act 300, Public Acts of 1909, as amended, and it states in part as follows:

". . . within two years after the delivery of any shipment of freight at destination, and not after, any person aggrieved may complain to the Commission that the charge exacted for the transportation of such freight between points in Michigan is illegal or exorbitant, and thereupon the Commission shall have power to investigate such complaint, and to hear the same and to decide upon the merits thereof in the manner provided by § 22 of this act. . . ."

[1, 2] The Commission has had in effect since 1920 rules and regulations regarding informal reparation docket cases as authorized by our order of January 29, 1920, in Docket No. 1361, and many cases have been settled under such rules in which defendants participated. Our action in informal cases has no authority in law, except the authority upon which we take similar action in formal cases, that is, we have endeavored to simplify the procedure on the informal docket by acknowledging the application of the carrier as the equivalent of a complaint and answer, and by accepting its admission that the rate charged

under the circumstances then existing was unreasonable as a sufficient compliance with the requirement of the law for a formal hearing. The informal docket is, therefore, informal only in respect to the form of pleadings and the character of the hearing. The position of defendants' counsel that we have no authority to handle reparation matters in an informal manner is not well taken.

[3] We do not believe that there is any difference of opinion with respect to the fact that a complaint must be filed within the designated time by any aggrieved person, but there are different opinions as to the procedure. Under our informal docket the carriers complete the evidence to be submitted and file the application and request an order. In other words, the shipper and carrier agree to submit a completed case for our final decision. The fact that our rules provide that such applications may be filed with us by the carrier does not abrogate a shipper's right of recovery in the event that shipper and carrier cannot agree.

The statute does not attempt to outline a specific form which must be followed by a complaining party when a complaint is filed with us, and while we have established rules of practice governing formal proceedings, nevertheless we cannot, under the guise of a technicality, refuse to entertain a complaint that describes the matters complained of with reasonable definiteness, and as we have stated above, the method of procedure is not important so long as all requirements of law imposed upon all interested parties are met.

We believe there is a misapprehension on the part of defendants' counsel with respect to the tolling of the statute of limitation in matters of this kind. Let us say here that the tolling of the statute is brought about or completed in all cases by the filing of a complaint (formal or otherwise) by any aggrieved person (shipper or carrier alike) with this Commission, and the acknowledgment from us that such complaint has been received and registered. The time elapsing between such registration and the final determination of the matter as well as the procedure followed does not invalidate the claim.

The record indicates that complainant filed its claim with

this Commission on February 21, 1925, and an acknowledgment was made by us on February 24, 1925, registering the same. Complainant then proceeded to negotiate with defendants for submission of the claim upon our informal docket. After a time complainant was advised that such procedure was impossible and after due consideration a complaint was filed on August 27, 1926, asking that we proceed to hear the matter under our formal docket. We are of the opinion that the complaint was seasonably filed and that we have jurisdiction to pass upon the matters involved.

Complainant operates a lumber plant at Sault Ste. Marie, Michigan, and among the by-product produced is charcoal, which is a residue that is left after the wood goes through a distillation process. The production of charcoal was started about August 1, 1923, and shipments to Detroit, Michigan, commenced soon thereafter. The record indicates that complainant was very active in its endeavor to secure a rate from the carriers which, in its opinion, would enable it to reasonably compete in the Detroit market, such negotiations starting in 1922. On November 18, 1923, defendants published a commodity rate of 29 cents per hundred pounds, minimum weight 30,000 pounds per car. However, that rating was of no benefit to complainant, because the rate of 29 cents was also the classification rating, namely, the 6th class with a minimum of 24,000 pounds, subject to Rule 34 of the classification.

By continued negotiations by complainant with the carriers a rate of 22½ cents per hundred pounds, minimum 26,000 pounds, was published effective August 21, 1924, and contrary to statements of record, this rate was not a restricted rate. Effective August 30, 1925, however, the rate was restricted to apply via Mackinaw City—Michigan Central and connections.

Complainant submits comparative rates and mileages from charcoal producing territories to Detroit and elsewhere. Competition in Detroit comes from New York and Pennsylvania producing points and Manistique, Michigan. The general rate from these districts has been 22½ cents per hundred pounds for some time. Mileages from the New York and Pennsylvania points to Detroit, Michigan, vary from 327 miles to 583 miles

via well established routes, and over which the rates are applicable. The mileage from Manistique to Detroit, Michigan, via Mackinaw City is 389 miles, and across lake 363 miles and over. The mileage from Sault Ste. Marie, Michigan to Detroit, Michigan, is 389 miles via the route which the traffic moved.

Defendants produced evidence showing the per-ton and per-car-mile earnings accruing under the 29 cent rate, and also the 22½ cent rate, and indicate that the publication of the 22½ cent rate was made in order that complainant could meet competition in Detroit, Michigan, but contend that the establishment of such rate does not, necessarily, conclude that it is a reasonable rate from the carriers' standpoint. This argument loses much of its force, however, when it is found, from an examination of the record, that defendants have failed to produce any comparisons which would disclose or convince us that the 22½ cent rate is not a reasonable rate, while comparisons submitted by complainant, especially the comparison of the rate from Manistique, Michigan, does convince us that the 22½ cent rate now applicable from Sault Ste. Marie is not a depressed rate when mileage and other factors are taken into consideration.

We find that the rate assailed was unreasonable to the extent that it exceeded a rate of 22½ cents per hundred pounds, in carloads, minimum weight 26,000 pounds; that shipments were made at the rate herein found unreasonable and that complainant paid and bore the charges thereon; that it has been damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rate herein found reasonable; and that it is entitled to reparation in the amount of $1,156.20.

Note.—Procedure.

I. In general, 543.
II. Scope of proceedings, 544.

I. In general.

In Re United Teleph. Co. Nos. 9004, 9005, 9006, Aug. 20, 1927, the Indiana Commission rescinded and annulled orders approved at a former hearing held by one of the Commissioners under the impression that full legal publication of the hearing had been effected. Subsequent investigation proving that one of the required newspapers

had failed to print the notice in the issue 10 days prior to the hearing, the Commission was of the opinion that all action taken at the hearing was void for lack of legal publication.

A complaint that proposed changes in freight rates, filed by a carrier with the Maine Commission as provided by revised statutes, Chap. 55, § 28, as amended by P. L. 1917, Chap. 135, are unreasonable, need not be filed before they become effective rates. Warren Co. v. Maine C. R. Co. — Me. —, 135 Atl. 526, Dec. 30, 1926.

In Re Staten Island Rapid Transit R. Co. Case No. 1784, Dec. 30, 1925, the New York Public Service Commission, although having no authority to exempt railroads from a statute requiring electrification, permitted the introduction of considerable testimony to show injurious results of the electrification, Chairman Prendergast stating: "It may well be that the introduction of much of the testimony at the hearings on November 18th and 24th, and December 7th, in this case, was immaterial, and permission to introduce it should not have been given. At the same time in the very nature of a Public Service Commission proceeding, and especially one where the public feels it has a right to express its views irrespective of the materiality of the evidence, and I believe this is such a case, it was deemed best to permit all different interests concerned to state their views upon the record."

II. Scope of proceedings.

A contention that telephone rates are too high and that a lower rate for a different grade of service should be installed so that there would be more users is not in issue and will be disregarded on an application for authority to purchase and operate a system. Re Ideal Teleph. Co. (Mo.) Case No. 4621, March 4, 1926.

A complaint that the operation of the ringing machine by the telephone company interfered with the reception by radio owners will not be considered in a proceeding for a rate increase. Re Laddonia Rural Teleph. Co. (Mo.) Case No. 4610, March 24, 1926.

Authority to discontinue an arrangement whereby rural subscribers are given free long distance service to certain points should not be granted in a rate case if the request for such authority is not embodied in the application nor included in the notice of hearing. Re Barron County Teleph. Co. (Wis.) U-3139, March 26, 1925.

The matter of discontinuing free interexchange telephone service was not considered in a case in which the company did not request authority to discontinue such service and did not ask that the cost of the free service be included in the exchange rates, although it was intimated that at some future time application might be made to establish a toll charge. Re Wisconsin Teleph. Co. (Wis.) U-3091, March 31, 1925.

IDAHO PUBLIC UTILITIES COMMISSION.

AMBROSE W. CODD et al. Doing Business Under Name of Codd & Allen Lumber Company

v.

McGOLDRICK LUMBER COMPANY.

[Case F-606, Order No. 1083.]

Commissions — Limitations as to jurisdiction.

1. The Commission as an administrative tribunal must operate under the law creating it, and its authority is restricted to that expressly and by necessary implication conferred upon it by the legislature, p. 551.

Commissions — Jurisdiction — Legal questions — What constitutes common carrier.

2. The determination by the Commission in a case in which the status and duties of a logging railroad alleged to be a common carrier are involved, must be made alone upon an application of the evidence presented at the hearing to the term "railroad" or the term "common carrier," as each is defined by the statutes governing and defining the powers and duties of the Commission, p. 551.

Public utilities — Duty of Commission — Determination of character of railroad.

3. The Commission must determine its jurisdiction over a logging railroad on evidence bearing upon the service which the railroad has rendered, or is rendering, to the public, and not upon the fact of its existence as a railroad, and the same principle applies to the terms "railroad corporation," "common carrier," and "public utility," p. 551.

Public utilities — Necessity for profession of service — Commission jurisdiction.

4. A corporation may or may not engage in public service, and until it does it is not subject to the jurisdiction of the Public Utilities Commission, p. 551.

Public utilities — What constitute — Logging railroad company.

5. A lumber company owning and operating a logging railroad exclusively for hauling its own products is neither a railroad corporation, a common carrier, nor a public utility, as defined by the statutes governing the powers and duties of the Idaho Commission, p. 551.

[June 16, 1927.]

COMPLAINT against the refusal of a lumber company operating a logging railroad to render service to another company; complaint dismissed.

Appearances: N. D. Wernette, Coeur d'Alene, attorney for

complainants; C. D. Randall, of the firm of Randall & Danskin, Spokane, Washington, and Robert H. Elder, Coeur d'Alene, attorneys for defendant; John P. Gray, Coeur d'Alene, attorney for interveners, Blackwell Lumber Company, Coeur d'Alene, and Potlatch Lumber Company, Potlatch.

By the **Commission:** On June 25, 1926, the complaint in the above entitled matter was filed with this Commission, and, on July 19, 1926, the defendant filed its answer thereto. On the 2nd day of August, 1926, the petition of the above named interveners, requesting that they be permitted to appear and intervene in this proceeding, was filed, and thereafter, by order of this Commission, the request of the said interveners was granted.

After due notice given hearings were held at Tensed, Idaho, September 27, 1926, and at Coeur d'Alene, Idaho, October 19 and 20, 1926. At said hearings the parties were represented by the attorneys as above set forth. Oral and documentary evidence was introduced on behalf of the complainants, defendant, and interveners. At the conclusion of the evidence on behalf of the complainants, the attorneys for the defendant made a motion for dismissal, as hereinafter set forth. The ruling on said motion was reserved by the Commission.

Time was given within which to file briefs, and at the request of the attorneys for the complainants, he was allowed until February 15, 1927, and the defendant and interveners were allowed forty days after being served with a copy of the brief of the complainants, and defendant's and intervener's time for filing briefs was extended by stipulation twenty days beyond the said forty-day period. The brief of the complainants was filed with this Commission February 11, 1927, the brief of the defendant April 18, 1927, and the reply brief of the complainants April 30, 1927, and the matter is now ready for decision.

Statement.

The complainants, Ambrose W. Codd and John V. Allen, copartners, are engaged in the lumbering industry in Hangman Creek Basin, Benewah county, Idaho, and own approximately twenty-five million feet of merchantable timber standing on

lands in the vicinity of Tensed, said county and state. Complainants operate several saw mills in said Hangman Creek Basin and cut and ship several million feet of lumber each year. There is very little local market for timber in Hangman Creek Basin, and in consequence thereof, the complainants' timber and lumber products have to be shipped to other markets.

The defendant, the McGoldrick Lumber Company, is a corporation duly organized under the laws of the state of Washington, and is authorized to do business within the state of Idaho by reason of having complied with the laws applicable to foreign corporations doing business in this state. The said defendant has been, and is now, engaged in an extensive timber and lumber business in Spokane, Washington, and has extensive timber holdings in Hangman Creek Basin and Santa Creek Basin in Idaho.

During the year 1925, the said defendant constructed a railroad extending from a point about two and one-quarter miles easterly from the town of Tekoa, Washington, which said point is in Idaho, being one-quarter of a mile east of the state line between the states of Idaho and Washington, in a southerly and easterly direction in Idaho of about fifteen miles through Tensed, Idaho, to a point near the Junction of Indian Creek and Hangman Creek. Said defendant is now operating, and has ever since the construction thereof operated, said railroad exclusively for the transportation of logs owned by it, and has at all times refused, and still refuses, to accept for transportation over said railroad, the lumber and timber products of these complainants, and the agricultural products of Hangman Creek Basin.

On account of the refusal of the defendant to accept complainants' timber and lumber products at Tensed, Idaho, and at all other points on said railroad, and provide transportation therefrom by its said railroad, forces the complainants to transport their timber and lumber products to the town of Tekoa, Washington by truck for shipment. The railroad of the Oregon-Washington Railroad & Navigation Company and of the Chicago, Milwaukee & St. Paul Railway Company pass through Tekoa, Washington. Tekoa, Washington is about ten miles westerly from Tensed, Idaho, and, with the exception of from three to four months of each year, the condition of the highways be-

tween Tensed, Idaho, and Tekoa, Washington, has been, and still is, such that heavy loads cannot be hauled over them except with great difficulty and at great expense.

The evidence shows that Hangman Creek Basin extends easterly from Tekoa, Washington, into Idaho, for a distance of about eighteen miles with an average width of about six miles, and the soil in said basin is rich and fertile. The major portion of the northern half of said Hangman Creek Basin is highly developed agricultural lands, and the southern half is principally timber land. The principal crops raised in the agricultural portion of said basin are wheat, oats, barley, and hay, and these are produced in considerable quantities. Some cattle, hogs, and horses are also raised in this basin for market. Said agricultural products have to be hauled to Tekoa, Washington over highways which are almost impassable the major portion of the year.

It is estimated that there are more than two hundred million feet of merchantable timber in Hangman Creek Basin, of which the defendant owns approximately one hundred seventy million feet. The defendant also owns approximately two hundred fifty million feet of merchantable timber in Santa Creek Basin, which Santa Creek Basin lies adjacent to Hangman Creek Basin. The railroad of the said defendant is now constructed to the head of Hangman Creek Basin.

Said complainants have demanded the defendant to accept their timber products at Tensed, Idaho, for shipment over defendant's said railroad, which connects with the railroad of the Oregon-Washington Railroad & Navigation Company near the state line between Idaho and Washington, and have offered and tendered to said defendant to construct a sidetrack along the main line of defendant's railroad at Tensed, Idaho, where cars could be loaded. This offer the defendant has refused, and still refuses, to accept. Defendant has refused, and still refuses, to accept and haul the complainants' said lumber products, or any freight shipments of the complainants', over said railroad. The said defendant has also ever since it started operation of said railroad refused, and still refuses, to accept and haul any passengers, freight, or express other than its own freight over the said railroad.

There was introduced in evidence considerable testimony with reference to the purchasing and obtaining the right of way for defendant's railroad. It was contended by some of the witnesses for the complainants that it was a part of the consideration, for conveying to the defendant certain lands as right of way, that the defendant agreed to accept and haul the agricultural products of Hangman Creek Basin in carload lots over its said railroad when constructed to the state line and deliver the same to the Oregon-Washington Railroad & Navigation Company at said point.

Evidence was also introduced with reference to a hearing before the Board of County Commissioners at St. Maries, Benewah county, Idaho, claiming that the defendant agreed to haul the agricultural products of Hangman Creek Basin in consideration of the county permitting it to use as a right of way, where necessary, the highways in said Benewah county. That said franchise was given to the defendant to use said highways by the County Commissioners on account of the benefits which would accrue to the owners of property in said Hangman Creek Basin, by reason of the opportunity to be afforded in the use of said railroad for the shipment of the agricultural products to market. Further evidence was introduced showing that the defendant had instituted proceedings under the right of eminent domain to secure right of way on which to construct said railroad.

The defendant contends that it is impracticable for it to transport cars loaded with agricultural products and timber products of others over its said railroad, for the reason that the railroad is not constructed in such a manner as will permit it, with safety, to do so, and further that it has not the equipment and facilities adequate for such purposes. That the railroad is constructed of second-hand steel rails of sixty pounds weight, and the ballast on its track is only about twenty per cent of what is used customarily on railroads.

There are no stations on this railroad line, and the defendant owns but one locomotive and one flat car. Said flat car is used for holding the defendant's steam loader, which is used in loading logs. That defendant contracts the loading and the de-

livery of the cars loaded with logs to the Oregon-Washington Railroad & Navigation Company near the Idaho state line, under what is known as the gippo system. Under the gippo system, a contract is first for the loading of the logs on the car, or cars, and for their delivery to the point agreed upon in such contract to one person who, in turn, hires three or four men to work for him. The contractor loads the logs on the cars and then takes the defendant's locomotive, which the defendant furnishes him under the agreement, and delivers the car, or cars, of logs to the Oregon-Washington Railroad & Navigation Company to the place agreed upon in such agreement. The defendant delivers the logs to its railroad. The entire control of the engine and equipment is turned over to the gippo contractor under the agreement. The gippo contracts provide for compensation by the thousand feet.

It appears from the evidence that the agents and officers of said defendant, the McGoldrick Lumber Company, did represent to the farmers in Hangman Creek Basin, and to the County Commissioners of Benewah County, Idaho, in the negotiations for rights of way for said railroad, that if it were convenient during the operation, and not impracticable for it to do so, the defendant would haul grain and other farm products over its said railroad in carload lots if it were possible to do so without it becoming a common carrier.

It appears that the Oregon-Washington Railroad & Navigation Company furnishes the defendant with the cars for the transportation of logs, and it is the contention that arrangements could also be made with the Oregon-Washington Railroad & Navigation Company to furnish cars in which to transport the complainants' timber and timber products and, also, the agricultural products of Hangman Creek Basin over defendant's said railroad.

The motion for dismissal made by the attorneys for the defendant challenges the sufficiency of the evidence introduced by the complainants, and moves the dismissal of complainants' petition upon the following grounds, to wit:

I.

"That said petition does not state facts sufficient to constitute a cause for action.

II.

"That evidence shows that the Public Utilities Commission of the state of Idaho has no jurisdiction of the defendant or of the subject matter of the petition, for the following reasons:

"(a) The logging railroad of the defendant is not a railroad as defined by § 2377 of the Compiled Statutes of Idaho.

"(b) The defendant, McGoldrick Lumber Company, is not a railroad corporation, as defined by § 2378 of the Compiled Statutes of Idaho.

"(c) The defendant, McGoldrick Lumber Company, is not a common carrier, as defined by § 2380 of the Compiled Statutes of Idaho.

"(d) The defendant, McGoldrick Lumber Company, is not a public utility, as defined by § 2396 of the Compiled Statutes of Idaho.

"(e) The defendant is not a railroad or railroad company or a common carrier, as defined by §§ 5 and 6 of Article XI of the Constitution of the state of Idaho, or under any other law of the state of Idaho.

III.

"The evidence fails to show that there is any public necessity or that public convenience will be served by the operation of said railroad as a common carrier.

IV.

"The evidence shows that the McGoldrick Lumber Company's track extends no further than a point near to, but east of the Idaho-Washington state line, which is over two miles distant from Tekoa, Washington, and no order made herein could require the McGoldrick Lumber Company to accept goods for transportation to Tekoa, Washington."

[1–5] The attorney for the complainants contends that because the defendant owns a railroad in Idaho that such railroad, under the provisions of § 5, Article XI of the Idaho Constitution, is a common carrier and subject to the jurisdiction of this Commission.

Section 5, Article XI of the Constitution of the state of Idaho declares all railroads public highways, as follows:

"Section 5. Regulation and control of railroads. All railroads shall be public highways, and all railroad, transportation and express companies shall be common carriers, and subject to legislative control and the legislature shall have the power to regulate and control by law the rate of charges for the transportation of passengers and freight by such companies or other common carriers from one point to another in the state. Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any designated points within this state, and to connect within or at the state line with railroads of other states and territories. Every railroad company shall have the right with its road to intersect, connect with or cross any other railroad under such regulations as may be prescribed by law upon making due compensation."

If the defendant's track is a "railroad" is must be admitted that, under the above provision of the Constitution, "All railroads shall be public highway" it is, at least, a public highway.

What is a railroad? Elliott on Railroads, Third Edition, Volume 1, § 5, defines a railroad, as follows:

"A railroad has been defined as 'a road graded and having rails of iron or other material for the wheels of carriages to run upon.' This definition is no longer as accurate as it was when the patrons of the railroad company furnished, or were supposed to furnish, the vehicles, yet it is perhaps as accurate as any brief definition that can be given."

The supreme court of Oklahoma in the case of Muskogee Electric Traction Co. v. Doering, — Okla. —, 172 Pac. 793, 795, said:

"Whether or not it is a railroad cannot be determined by the power with which its cars are operated, and if otherwise coming within the definition of a railroad, it is entirely immaterial whether its cars be operated by steam or electricity or any other power. In 33 Cyc. page 33A, the railroad is defined as—A road specially laid out and graded having parallel rails of iron or steel for the wheels of carriages or cars drawn by steam or other motive power to run upon."

In Massachusetts Loan & Trust Co. v. Hamilton, 32 C. C. A. 46, 48, 88 Fed. 588, there is stated:

"But little is gained by a reference solely to the meaning of the word 'railroad.' The word of itself, has no such fixed definition as to enable the court to determine whether, by its mere use in a statute, it applies to street railways or not. It may or may not include them. It may be used in the statute in its broadest sense, or it may be used in its technical or popular sense. 19 Am. & Eng. Enc. Law, 777 et seq.; Bishop v. North, 11 Mees. & W. 418; Lieberman v. Chicago & S. S. R. T. R. Co. 141 Ill. 140, 147, 30 N. E. 544; Bloxham v. Consumers' Electric Light & Street R. Co. 36 Fla. 519, 539, 18 So. 444; Funk v. St. Paul City R. Co. 61 Minn. 435, 63 N. W. 1099. In its broadest sense, it undoubtedly includes a street railroad, and every other kind of a road or way on which rails of iron are laid for the wheels of cars to run upon, whether propelled by steam, electricity, horse, or other power, carrying light or heavy loads of freight or passengers, or both. 2 Bouv. Law Dict. tit. 'Railroads.'"

In the case of Doughty v. Firbank, 10 Q. B. Division 358, 359, a railway is defined to be:

"A way upon which trains may pass by means of rails."

In United States v. Union Stock-Yards Co. 161 Fed. 919, it is held:

"A railroad has been defined as a road or way on which iron rails are laid for wheels to run for the conveyance of heavy loads and vehicles. Dinsmore v. Racine & M. R. Co. 12 Wis. 649. Such a track is a railroad independent of the use made of the track in hauling cars over it, as was pointed out in Lake Superior & M. R. Co. v. United States, 93 U. S. 442, 23 L. ed. 965."

The Supreme Court of the United States in the case of Lake Superior & M. R. Co. v. United States, *supra,* makes use of the following language:

"The forms of legislative expression thus adopted and coming down from a period when they had greater practical significance than they now have, bring with them an established sense which renders them free from all uncertainty and doubt.

We know, as well as we know the sense of any phrase in the English language which has an historical meaning and application, what is meant when a railroad is spoken of in a law as a 'public highway.' We know that it refers to the immovable structure stretching across the country, graded and railed, for the use of the locomotive and its train of cars."

Upon a consideration of the foregoing and the evidence in this case, this Commission is of the opinion that defendant's road comes within the definition of what constitutes a railroad, and is a public highway, under the provision "All railroads shall be public highways" of the above quoted section of the Idaho Constitution.

The defendant's track being a railroad it is a public highway, and others have the right to the use of defendant's public highway upon paying a just and reasonable compensation for such use. Defendant contends that its railroad is, and has been, used only for the transportation of logs. That, on account of the manner in which its railroad has been constructed, it is unsafe for cars to run over it except at a low rate of speed. Admitting this to be a fact, it being a public highway, it would appear that the complainants in this case have the right to make arrangements with the Oregon-Washington Railroad & Navigation Company for cars to be spotted on defendant's railroad for their lumber and lumber products, and use the defendant's railroad for the transportation of such cars over it at a low rate of speed, in accordance with just and reasonable terms, and upon payment of a reasonable compensation therefor. In case such right exists in favor of the complainants, it also exists and may be exercised in the movements of farm products in carload lots over said railroad.

The second clause of § 5, Article XI of the Constitution is ". . . and all railroad, transportation, and express companies shall be common carriers and subject to legislative control. . . ." If the defendant is a railroad company under the above provision, it is declared by the said section of the Constitution to be a common carrier. One of the purposes for which the defendant was incorporated is ". . . building, equipping and running railroads. . . ." The defendant having in its articles

of incorporation included as one of its purposes of organization, ". . . building, equipping, and running of railroads . . ," it has the right to operate a railroad as provided by said § 5, Article XI. "Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any designated points within this state, and to connect within or at the state line with railroads of other states and territories." Has the company exercised this right? It is the exercise of a right that creates the duty.

If the defendant is a railroad company, it is declared by said provision of the Constitution to be a common carrier. What is a railroad company?

"A railroad company is defined as an association of men who engage in the business of hauling passengers and freight; Re Ferguson Contracting Co. 183 Fed. 880, 882. Neither a logging road; Ellington v. Beaver Dam Lumber Co. 93 Ga. 53, 19 S. E. 21; McKivergan v. Alexander & Edgar Lumber Co. 124 Wis. 60, 102 N. W. 332; nor a road of rails used only in the construction of a railroad; Beeson v. Busenbark, 44 Kan. 669, 25 Pac. 48, 10 L.R.A. 839; nor a construction train; Griggs v. Houston & Co. 104 U. S. 553, 26 L. ed. 840, come within the legal conception."

Bouvier's Law Dictionary, Vol. 3, tit. Railroads.

The supreme court of Florida in the case of Taylor v. Prairie Pebble Phosphate Co. 61 Fla. 455, 54 So. 904, holds:

"A corporation or company engaged in phosphate mining, and as an incident thereto operates trolley engines and cars for hauling the phosphate, is not 'a railroad company' within the terms and meaning of the sections referred to. See McKivergan v. Alexander & Edgar Lumber Co. 124 Wis. 60, 102 N. W. 332; Railey v. Garbutt & Co. 112 Ga. 288, 37 S. E. 360; Bradford Construction Co. v. Heflin, 88 Miss. 314, 42 So. 174, 12 L.R.A.(N.S.) 1040, 8 Am. & Eng. Ann. Cas. 1077."

The evidence in this matter is conclusive that the defendant's railroad has not been used, and is not being used, for any other purpose than the transportation of its logs, which was, and is, incident to and connected with its lumbering business at Spokane, Washington.

The counsel for the complainants in his excellent brief has cited several Idaho cases in support of his contention that the defendant is a common carrier. The principal ones of which are as follows:

In the case of Connolly v. Woods, 13 Idaho, 591, 92 Pac. 573, the supreme court of Idaho, having under consideration the above section of the Constitution, states:

"Under the provisions of § 5, article XI, of the Constitution of this state, all railroads are declared to be public highways and common carriers, subject to legislative control, and under that provision of the Constitution, every railroad is made a public service corporation and is, therefore, entitled to the right of eminent domain, and if it refuses to perform any of the duties that it owes to the public, it may be compelled to do so. . . .

". . . Recurring again to the right of eminent domain, it will be observed that very few states have constitutional provisions as broad as our own on that subject. The contour and formation of the state and its industries of mining and irrigation made it absolutely necessary for the complete development of the resources of the state to have very liberal laws on the subject of eminent domain. The framers of our Constitution, fully realized that, inserted in the Constitution of this state § 14 of article I, which is as follows: 'The necessary use of lands for the construction of reservoirs, or storage basins, for the purposes of irrigation, or for the right of way for the construction of canals, ditches, flumes, or pipes to convey water to the place of use for any useful, beneficial, or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the state. Private property may be taken for public use, but not until a just compensation, to be ascertained in a manner prescribed by law, shall be paid therefor.' This court had that section under consideration in the case of Potlatch

Lumber Co. v. Peterson, 12 Idaho, 769, 88 Pac. 426. We do not cite this case as having any particular bearing on the case at bar, except to show that under our Constitution the authority to exercise the right of eminent domain has been extended and made broader than that right in many of the states, and is not made to depend upon the narrow and restricted meaning of the phrase 'public use' as defined by the courts of last resort of some of the other states. We, therefore, arrive at the conclusion that said railway company was organized as a railroad corporation under the laws of this state, and under the provisions of the Constitution and law it is a common carrier, and cannot legally use its line of railroad for the private use and benefit of anyone, even if it so desired, and so intended at the time of its organization, and for that reason the defense stricken out of the answer was not a good defense."

In the case of McLean v. District Court, 24 Idaho, 441, 460, 134 Pac. 536, 541, Ann. Cas. 1915D, 542, again the supreme court of the state of Idaho, said:

"There are allegations in the petition, and argument was made upon the hearing, to the effect that the railroad company was not organized for the purpose of serving the public, but was organized for the sole purpose of carrying lumber and logs for personal use, and that there was to be no public use when the railroad was completed and put in operation. The court, however, finds in this case that the railroad company was organized under the laws of the state and for a public use, and under the Constitution of this state (§ 5, art. XI), that all railroads are public highways and common carriers, which brings it within the constitutional and statutory requirement that all railroads are to be public highways and common carriers 'subject to legislative control,' and it matters not what the intention of the corporation is or may be, it is made a common carrier by the Constitution, and if the railroad company refuses to perform any of the duties it owes to the public, it may be compelled to act, and if it fails to operate its road, the property condemned reverts to the owner of the freehold."

The attorneys for the defendant in their able brief discuss several Idaho cases, principal among which is the case of Black-

well Lumber Co. v. Empire Mill Co. 28 Idaho, 556, 578, 155 Pac. 680, 688, the supreme court of Idaho says:

"Counsel for respondent contend that the law provides appellant with ample means whereby it may organize a railroad company to construct whatever lines it may find necessary to enable it to reach all of the timber referred to in the complaint, but that the law does not permit a private appropriation of private property in the manner sought to be accomplished in this action, and cite in support of that contention, Connolly v. Woods, 13 Idaho, 591, 92 Pac. 573, and McLean v. District Court, 24 Idaho, 441, 134 Pac. 536, Ann. Cas. 1915D, 542.

"In the case of Connolly v. Woods, *supra,* the court referred to § 5 of art. XI. of the State Constitution, which declares all railroads, transportation and express companies to be common carriers, and the court held that every railroad is made a public service corporation, and, therefore, entitled to exercise the right of eminent domain, and if it refuses to perform any of the duties that it owes to the public, it may be compelled to do so.

"In the McLean case, *supra,* the court held that when a railroad is organized under the laws of the state as a railroad corporation and for public use such railroad is governed by constitutional provisions and the statutes of the state; that railroads are public highways and common carriers, subject to legislative control.

"No doubt, under the provisions of said section of the Constitution, the logging railway proposed would be required to haul logs of other land owners along its line, provided such land owners delivered their logs to the railroad for transportation, but it could not be compelled to put on a passenger and express train, under the facts of this case. That section of the Constitution refers more particularly to railroads that are constructed for general transportation and not to such a road as the one referred to in the complaint, to be constructed for removing the timber from 400 acres of land."

It would appear from the last sentence above quoted that the court holds in substance that § 5 of Article XI of the Constitution refers more particularly to the railroads that are construct-

ed for general transportation and not to a road constructed for removing the timber from a body of land.

This Commission as an administrative tribunal must operate under the law creating it, and its authority is restricted to that expressly and by necessary implication conferred upon it by the legislature.

Alabama Great Southern R. Co. v. Public Service Commission, 210 Ala. 151, P.U.R.1924A, 477, 97 So. 226; Public Service Commission v. St. Louis-S. F. R. Co. 301 Mo. 157, P.U.R.1924B, 690, 256 S. W. 226; Southern Oil Corp. v. Yale Nat. Gas Co. 89 Okla. 121, P.U.R.1924A, 435, 214 Pac. 131; Wisconsin-Minnesota Light & P. Co. v. Wisconsin R. Commission, 183 Wis. 96, P.U.R.1924C, 534, 197 N. W. 359.

The jurisdiction to determine what constitutes a common carrier and the duties thereof under § 5, Article XI of the Constitution is vested alone in the judiciary of this state. This Commission is not a court and it can exercise judicial functions only in so far as the exercises thereof come within the scope of, and are incident to, its administrative powers as defined by law. It is not vested with jurisdiction to determine the legal requirements of a railroad under § 5, Article XI, and then after making such determination, decide (if the railroad company had complied with requirements so determined) that the railroad company is a common carrier within the provisions of the public utilities law. In determining the jurisdiction of this Commission, there is not involved the legal duties and obligations of a company owning a railroad under said § 5, Article XI of the Constitution, but the determination must be made alone upon an application of the evidence presented at the hearing to the term "railroad" or the term "common carrier," as each is defined by the statutes governing and defining the powers and duties of this Commission. Sections 2377, 2378, 2380, and 2396 of the Idaho Compiled Statutes which define the terms "railroad," "railroad corporation," "common carrier," and "public utility" under the law creating this Commission, and cited in defendant's said motion for dismissal, are as follows:

"Section 2377. Railroad. The term 'railroad' when used in this chapter includes every commercial, interurban and other

railway other than a street railroad, and each and every branch or extension thereof, by whatsoever power operated, together with all tracks, bridges, trestles, rights of way, subways, stations, tunnels, depots, union depots, ferries, yards, grounds, terminals, terminal facilities, structures, and equipment, and all other real estate, fixtures, and personal property of every kind used in connection therewith, owned, controlled, operated, or managed for public use in the transportation of persons or property."

"Section 2378. Railroad corporation. The term 'railroad corporation' when used in this chapter includes every corporation or persons, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operatting, or managing any railroad for compensation within this state."

"Section 2380. Common carrier. The term 'common carrier' when used in this chapter includes:

1. Every railroad corporation, street railroad corporation, express corporation, dispatch, sleeping car, dining car, drawing-room car, freight line, refrigerator, oil, stock, fruit, car loaning, car renting, car loading and every other car corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, operating for compensation within this state.

2. Every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever owning, controlling, operating, or managing any vessel regularly engaged in the transportation of persons or property for compensation upon the waters of this state; and

3. Every corporation, person or persons, their lessees, trustees, receivers or trustees appointed by any court whatsoever owning, controlling, managing, operating, driving, or causing to be operated or driven, or holding out by sign, voice or other device or by advertisement that they will drive, operate, or cause to be driven or operated over any particular route or routes or over any route or routes or between specified termini for hire or compensation any automobile, auto stage, motor vehicle or motor truck or any other self-propelled motor vehicle for use

in the business of carrying either passengers or freight or both, excepting such as run on rails or tracks not hereinbefore enumerated, and automobiles used exclusively as hearses, ambulances, hotel busses operating solely between hotel and trains, or automobiles or auto trucks used for carrying United States mails on star routes when actually engaged in carrying such mail.

The term 'common carrier,' when hereafter used in this chapter, shall be construed to mean all three classes in this section specified, unless otherwise stated."

"Section 2396. Public utility. The term 'public utility' when used in this chapter includes every common carrier, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger and warehouseman, as those terms are defined in this section and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control, and regulation of the Commission and to the provisions of this chapter: *Provided,* that the term 'public utility' as used in this chapter shall cover cases both where the service is performed and the commodity delivered directly to the public or some portion thereof, and where the service is performed or the commodity delivered to any corporation or corporations, or any person or persons, who in turn, either directly or indirectly or mediately or immediately, performs the services or delivers such commodity to or for the public or some portion thereof."

It appears from the above quoted § 2377 defining the term "railroad" that this Commission must determine its jurisdiction on evidence bearing upon the service and the character of the service which a railroad has rendered, or is rendering, to the public, and not upon the fact of its existence as a railroad. The same principle applies to the terms "railroad corporation," "common carrier," and "public utility."

A corporation may or may not engage in public service and until it does it is not subject to the jurisdiction of a state's Public Utilities Commission.

Southern California Edison Co. v. Railroad Commission, 194 Cal. 757, P.U.R.1915C, 269, 230 Pac. 661.

Upon a consideration of the evidence and the foregoing quoted sections of the statutes governing the powers and duties of this Commission with reference to railroads, this Commission finds:

1. That the complainants, Ambrose W. Codd and John V. Allen, a copartnership, are engaged in the lumbering industry in Hangman Creek Basin, Benewah county, Idaho, and own approximately twenty-five million feet of merchantable timber standing on lands in the vicinity of Tensed, said county and state.

2. That the complainants operate several saw mills in said Hangman Creek Basin, and cut and ship several million feet of lumber each year.

3. That the defendant, the McGoldrick Lumber Company, is a corporation duly organized under the laws of the state of Washington, and is authorized to do business within the state of Idaho by reason of having complied with the laws applicable thereto.

4. That the said defendant is now, and has been for several years last past, engaged in the timber and lumber business at Spokane, Washington, and owns approximately one-hundred-seventy million feet of merchantable timber, standing on lands in said Hangman Creek Valley, and cut and ship a large number of carloads of logs therefrom each year to its saw mills in Spokane, Washington.

5. That during the year of 1925 the said defendant constructed a railroad, extending from a point about two and one-quarter miles easterly from the town of Tekoa, Washington, which said point is about one-half mile east of the state line between the states of Idaho and Washington, in Idaho, thence in a southerly and easterly direction in Idaho for about fifteen miles through Tensed to a point near the junction of Indian Creek and Hangman Creek.

6. That the defendant's said railroad is now, and has been ever since its construction, used exclusively for the transportation of its own logs and for no other purpose.

7. That the complainants have requested the defendant corporation to accept and transport their timber and timber products over the said railroad, and the said defendant has at all

times refused, and still refuses, to accept and transport over said railroad the lumber and timber products of these complainants.

8. That the defendant corporation refuses, and has refused, at all times since the construction and operation of said railroad, to accept and transport for compensation any express, freight, or passengers.

9. That the defendant does not own in connection with said railroad adequate equipment for the rendering of express, freight, or passenger service on its said railroad.

10. That the representatives of the said defendant in negotiating for rights of way for its said railroad did represent to the farmers in Hangman Creek Basin, and to the county commissioners of Benewah county, Idaho, that if it were convenient, during the operation and not impracticable for it to do so, the defendant would haul grain and other products over said railroad in carload lots, provided it could be done without the corporation becoming a common carrier.

11. That the defendant's railroad is a public highway, but this Commission has no jurisdiction over public highways, and that its railroad does not come within the provision of § 2377 of the Idaho Compiled Statutes.

12. That the defendant company is not a railroad corporation, as defined by § 2378 of the Idaho Compiled Statutes, in that it does not own, control, operate, and manage any railroad for compensation within this state.

13. That the defendant is not a common carrier, as the said term is defined in § 2380 of the Idaho Compiled Statutes, in that it is not a sleeping car, a dining car, a drawing-room car, a freight line, a refrigerator, an oil, a stock, a fruit, a car loaning, a car renting, a car loading, or any other car corporation operating for compensation within this state.

14. That the said defendant company is not a public utility, as that term is defined in § 2396 of the Idaho Compiled Statutes, for the reason that in said section the term "public utility" is limited with reference to railroads, as that term is therein defined.

15. That the said defendant does not own and operate a rail-

road, nor is it a railroad corporation, nor is it a common carrier, as defined by the statutes governing the powers and duties of this Commission.

16. That this Commission cannot be guided in its determination of jurisdiction upon the fact as to whether or not the defendant owns a thing, defined in the general law as a "railroad," but it must be guided in its determination thereof upon the facts in evidence and an application of those facts to the express provisions in the term "railroad, etc.," as defined in the special statutes which created this Commission.

17. That the Commission is without jurisdiction in the premises, and the petition should, therefore, be dismissed.

ILLINOIS COMMERCE COMMISSION.

RE CHICAGO MOTOR COACH COMPANY.

[Supplemental Order No. 2190.]

Monopoly and competition — Inadequate service as reason for permitting competition — Motor transportation utility — Rerouteing.

1. Although temporary rerouteing of a coach company is permitted by the Commission because of street repairs, if upon hearing to make the new route permanent, it appears that present traction service is inadequate to take care of public convenience, that additional traction service is impossible because of traffic conditions, that present traction service could suffer no loss of patronage, and that coach service increases density of traffic but 2.3 per cent in certain sections while passenger capacity is increased 65.9 per cent—and serves its passengers in a satisfactory manner, the Commission in view of such efficiency will make permanent rerouteing although it may coincide at some points with traction routes, p. 566.

Automobiles — Commission jurisdiction — Rerouteing.

2. Regardless of whether or not it is the announced policy of a motor transportation utility to confine its operations to boulevards and not to engage in city wide transportation, the Commission reserves the right to order such transportation as public convenience requires whether on boulevards or central districts and will reroute such utilities at its discretion, p. 571.

Certificates of convenience and necessity — Forfeiture by nonuser.

3. Where a provision of the Commission law requires that upon issuance of a certificate of public convenience the same shall be put into operation within two years or become void for nonuser, a breach of

such conditions does not of itself work a forfeiture, but such conditions are subsequent and to be taken advantage of, if at all, by the body granting it, and not as a matter of right by a collateral complainant, and the Commission may decide that progressive or gradual installation over the routes permitted is a substantial compliance, although certain portions of the permit were entirely unused for two years, p. 572.

Certificates of convenience and necessity — Jurisdiction of Commissions — Rerouteing.

4. Although for rate making certain geographical segregations as a test or measure concerning a transportation utility may have been observed, the Commission is not restricted by the terms of applications or certificates of convenience to relegate operations of a utility to certain sections of a city, but may reroute any transportation utility to operate in any section of the city as an undivided whole, according to its opinions of the demands of public convenience, p. 575.

Certificates of convenience and necessity — Evidence of necessity — Scope of Commission deliberation — Rerouteing.

5. Under the law of Illinois a consideration of the inconvenience of certain individual property owners cannot affect the determination by the Commission of whether the necessities and convenience of the general public require the granting of an application of a motor transportation utility for certificates of convenience and necessity to operate along new routes, p. 576.

[June 22, 1927.]

APPLICATION of Chicago Motor Coach Company praying for certificate of convenience over certain rerouteing formerly temporary to be made absolute; certificate made final.

By the **Commission:** On the 7th day of May A. D. 1925, the Chicago Motor Coach Company filed an application before this Commission for authority for a temporary rerouteing of certain of its operations.

In its order of May 14, 1926, this Commission granted authority for such temporary rerouting and directed the Chicago Motor Coach Company to file within the next thirty days succeeding the date of the order on application for authority to establish permanent routes in the territory concerned. The petitioner, Chicago Motor Coach Company, complied with this order and filed within the required time an application for a permanent routeing.

Before hearings were held upon this latter application the city of Chicago, the Chicago Railways Company, Chicago City

Railway Company, Calumet & South Chicago Railway Company, and the Southern Street Railway Company (the preceding four railway companies being hereafter referred to as the "Chicago Surface Lines"), and certain property owners appealed the order of May 14, 1926, and the superior court of Cook county remanded the case to the Commission for the taking of further evidence, but allowed the order appealed to remain in effect pending such action by the Commission. The order in question, by its own terms, was to remain in effect only until the Clark street widening was accomplished and until the Commission had disposed of the application for a permanent routeing filed by petitioner, Chicago Motor Coach Company. As both the application of May 7, 1925, for a temporary rerouting and the application for a permanent routeing, involved almost identical facts and considerations, upon agreement of the parties interested this Commission proceeded to hear the application for a permanent routeing as finally amended.

The Chicago Motor Coach Company by an order of this Commission entered on January 15, 1917, was authorized to operate motor busses through the general territory concerned in the present case and over many of the thoroughfares concerned therein. Witnesses for the applicant, Chicago Motor Coach Company, testified that the new plan of operation presented certain operating advantages over the routeing authorized by the order of January 15, 1917, and in many respects would be advantageous to the people living in the territory.

[1] There was evidence that the new routes substituted Elm street for Schiller, which is preferable because of the greater width of the former street; that using LaSalle street would minimize operating on certain streets on which street car lines were constructed; that under existing circumstances it would be advantageous to the public to avoid operating motor coaches on Clark street between LaSalle street and Schiller street and upon State street between Division street and Rush street; that a turn would be avoided at the intersection of Clark street and North avenue, which the evidence showed was a very busy corner; that it would bring the operation of petitioner's busses in closer proximity to the territory lying south of North avenue, where un-

der existing conditions more transportation service is urgently needed.

The evidence further showed that the new routeing would increase the carrying capacity of streets entering the Loop and would provide convenient local service on the streets traversed, besides giving added capacity and wider range for pleasure riding and providing convenient connections to the parks and beaches. It was urged that the new operation would provide another main artery between what is usually termed the North side and the downtown district of Chicago. The district lying north of the Chicago river and south of Lincoln Park, which is traversed by the proposed operation, was formerly an old residence section of the city, which of late years has been turning rapidly into a boarding or rooming house district. The construction of large improvements in the way of modern apartment buildings may be expected in the near future and will, as a consequence, greatly increase the density of population and require greater transportation facilities.

The proof showed that the proposed routeing would give a desirable additional entrance into the Loop for petitioner's operations from the North side and would give petitioner's riders an opportunity to reach the central part of the loop. At the present time the Chicago Surface Lines furnish a street railway service in a north and south direction in portions of the territory concerned in the present case on State street, Clark street, Wells street, Sedgwick, and Halsted streets; an east and west service on Grand avenue, Chicago avenue, Division street, North avenue, and Center street; and by diagonal lines on Lincoln avenue and Clark street.

The proof showed that the territory which would be served by the routeing proposed by the applicant in this case, is exceedingly populous and closely built up, and that in the main, street railway lines which traverse it extend to the borders of the city so that due to the loading in the outlying districts it is exceedingly difficult at times for residents of the nearer territory to use such service. The big problem in every large closely settled community is the handling of mass transportation and the Commission is forced to the conclusion that in view of

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the density of population prevailing in the district involved in this case the present street railway transportation facilities furnished by the Chicago Surface Lines are not adequate and because of certain physical and geographic conditions which obtain in the district they cannot be materially improved or made adequate to meet the public necessities and conveniences.

The evidence convinces this Commission that there is no practical way by which the Chicago Surface Lines could furnish additional transportation service for this territory. The streets leading directly north from the Loop district and lying east of Clark street terminate at Lincoln Park, hence even if it were feasible to lay car tracks on them no direct outlet to the north would be available beyond North avenue nor could the situation be remedied by placing additional cars on the lines at present operating into the Loop district for there are certain traffic throats where these lines converge that have obviously reached the limit of their capacity at certain hours of the day so that no more cars can be efficiently gotten through at such times. Various engineering experts in the last ten years have indicated the need of additional service in this section but in spite of such recommendations the Chicago Surface Lines have not constructed any material extensions of track in this vicinity because of inability to get frontage consents and because of other insurmountable difficulties beyond their control.

The evidence showed that the most critical situation was that obtaining at the intersection of Clark street and Center street where there is a north and south street car operation on Clark street at this point, an operation of the Lincoln avenue cars on Center street turning into Clark street at this point, and an additional one-man car operation. At certain times of the day, the evidence showed, cars passed this point at as close a headway as is practicable or safe and that cars in large numbers accumulate there, backing up in a solid line for several blocks. This Commission does not believe it is feasible or safe to increase service at this point in any degree.

The removal of the Lincoln avenue cars from this intersection, as suggested by the Chicago Surface Lines, by the construction of new trackage in Lincoln avenue south of Center

street to Wells street and the rerouting of such cars over this track would in no way materially help the situation, in view of the fact that one of the potent elements in the congestion at this point is the loading of the Clark street cars immediately north of this intersection. In order to construct this new trackage on Lincoln avenue certain frontage consents would have to be obtained as a legal prerequisite and the proof showed that these had not been granted up to date although efforts to obtain them had been made from time to time for some years past. There is nothing in the evidence that would justify any anticipation that these consents would be obtained any time in the near future. There is no way that this Commission can compel the property owners concerned to grant the frontage consents necessary for removing the Lincoln avenue street car service from Clark and Center intersection and the Commission can see no feasible way of improving the service past this intersection.

Another throat or control point of street railway traffic is at the intersection of Lincoln avenue and Fullerton avenue, which is a three-way intersection. At certain times of the day, the proof showed that it had reached its capacity at the present time.

The proof indicated that the intersection at Clark street and Division street had reached its capacity at certain hours of the day, as well as the intersection of Clark street and Diversey Parkway.

The evidence showed that a large capital investment would be required if the Chicago Surface Lines were to make the extensions required by the necessities of the people and that it was not possible for the Surface Lines to effect the necessary refinancing under the 20-year franchise limit established by the existing law.

The evidence showed that during certain hours of the day the cars passing through the district concerned in this case are badly congested and overcrowded; that at times it is almost impossible for a person to board the cars and that frequently several cars pass intersections in this district without stopping, because of the fact that they can carry no more passengers, not even standees.

It was urged that the routeing asked for in the instant case

would materially congest Dearborn street and State street in the Loop district and in the territory immediately north of the river, but the evidence shows that the routeing in question would not materially add to the traffic of the streets in question and would not interfere with the regular movement of existing public transportation agencies. The petitioner, Chicago Motor Coach Company, introduced exhibits showing what portion of the traffic consisted of its busses on certain downtown streets where it now conducts operations and it appears that its busses on the average only constitute a small percentage of the traffic using such streets on the most heavily traveled thoroughfares in the Loop district.

We think it apparent from the evidence that the busses of the petitioner constitute only a negligible factor in the downtown traffic and that their presence on the streets does not materially interfere with either street car operation or other vehicular traffic. The evidence showed that the double-deck motor coach operation by petitioner is economical of street space, for while such coaches make only a negligible increase in vehicular traffic on a street, they provide seats for 68 passengers each, so that, for example, by putting 12 coaches per hour on Dearborn street northbound vehicular traffic in rush hours is increased only 2.3 per cent while the passenger carrying capacity of the street is increased 65.9 per cent.

The evidence showed that a large portion of the passengers carried by the Chicago Motor Coach Company were pleasure riders who would not be drawn from other transportation agencies; that the growth and population of Chicago has been so great that the installation of the motor bus has not caused a falling off in the number of passengers carried by the other agencies but, on the contrary, such agencies have had a constant annual increase in the number of passengers carried.

The evidence showed that in the case of the proposed change in routeing concerned herein the new operation would make the boulevards and parks in this portion of the city more readily accessible to the residents of the district between State street and LaSalle street from Lincoln Park to the Chicago river and would furnish them with an access to fresh air which is so essen-

tial and necessary to persons living in such a densely populated section of the city. In addition to serving the needs of this particular territory, the evidence showed that needed facilities would be furnished by the proposed operation to persons living to the west of and adjacent to Lincoln Park who now find the present street cars badly overcrowded at certain hours of the day. There was also proof showing that the new routeing would serve the necessities of residents in portions of the city north and south of the intersection of Diversey Parkway and Sheridan Road who are contiguous to the present motor coach operations of the petitioner, by enabling them to reach important business points west of Michigan avenue between North avenue and the central part of the Loop.

Petitioner is already an important factor in supplying general transportation service throughout the city of Chicago and is at the present time furnishing a satisfactory and extensive bus service throughout the general territory concerned in the present hearing. By installing the routes for which authority is asked in the petition filed herein, petitioner would be enabled to satisfy the transportation requirements of this district even more adequately and comprehensively than at the present time since it could then offer to patrons of its general North side service a more diversified choice of routes.

[2] Counsel for the Chicago Surface Lines made the contention that originally it was the announced policy of petitioner, Chicago Motor Coach Company, to confine its operations as closely as possible to the boulevards and not to engage in furnishing citywide transportation even though the necessities and conveniences of the public required it. Mr. John Hertz and Mr. Charles McCullough, of petitioner's board of directors, testified that they had no such thought when they entered into the motor coach business in Chicago and it is clear that whether such was their policy or not, this Commission has the power to order the petitioner to furnish such transportation as is found necessary and convenient throughout the territory which petitioner holds itself out as willing to serve, whether conducted on boulevards or on other thoroughfares. However, this Commission has never considered the scope of petitioner's motor coach

operation in Chicago in any such limited light, but on many occasions has authorized operations that did not partake of a boulevard character in the slightest degree. Indeed in a case involving operations of the petitioner on the South side of Chicago, the petitioner made an extension of its proposed routes over thoroughfares that were city streets in their entirety on the intimation of this Commission that the extended service would more adequately serve public convenience and necessity.

It is the view of this Commission that in all proper cases where there is a need for additional motor coach service in the City of Chicago this Commission may order the petitioner to furnish this service, whether on boulevards or other character of thoroughfares.

It was contended that the Chicago Motor Coach Company did not adequately serve its patrons in cold or inclement weather. There was evidence, however, to the effect that the number of passengers carried during the rush hours was not materially different throughout the year, thus indicating that the petitioner served its serious riders as adequately in the winter months as in the summer. Numerous improvements in motor coach construction are constantly enabling companies engaged in motor coach transportation to get a greater and more uniform use of their equipment throughout the year.

[3] A contention was made in this case that the operation for which petitioner seeks a new routing in this case was one which was authorized under the order granted to petitioner by the Commission's order of January 15, 1917, but which petitioner did not install within two years after the date of the order and hence, according to the contention of respondents herein, the authority for such an operation had become void for nonuser. We take the provision that the authority granted by a certificate of convenience and necessity must be exercised within two years or it shall be null and void to mean that the same must be substantially exercised within that time. We think that the provision is designed to prevent a petitioner from obtaining a certificate for a public utility operation with no intention of installing such operation at any time within the near future but for merely speculative purposes. We do not think it ap-

plicable to such conduct as the petitioner's in the present instance. In the order of January 15, 1917, the Commission authorized the Chicago Motor Coach Company to install a large number of operations on the North side of the city of Chicago coming into the Loop district which lies south of the Chicago river and it is apparent that the entire operation authorized could not be put into effect at once, but rather we think the order contemplated that the company should install its operations progressively, and gradually place the entire authorized service into effect. For this reason we think that this petitioner has exercised the authority granted in the aforesaid order according to the spirit and intent of that order and that the authority granted therein never lapsed for nonuser. In our opinion the law does not insist upon a strained, literal, or technical compliance with the conditions of such a grant, but a reasonable and substantial performance of the conditions is all that is necessary to defeat a claim to a forfeiture. (14a C. J. 1104; Chicago City R. Co. v. People ex rel. Story, 73 Ill. 541.) In any event we think that the law is settled that the breach of conditions by the recipient of a certificate of convenience and necessity does not *ipso facto* work a forfeiture of the certificate but that such conditions are in the nature of conditions subsequent and are to be taken advantage of if at all by the body granting the privilege.

In the case of Hagerla v. Mississippi River Power Co. 202 Fed. 776, 782, an Act of Congress granted to a power company authority to construct a dam across the Mississippi river. The Iowa Code provided that such water power construction must be commenced within two years after the grant of authority. Hagerla, a land owner in the bottoms, part of whose holdings would be submerged by the construction, challenged the right of the power company to take his land on the ground that the construction was not commenced as required by the statute. The Court said:

"But conditions subsequent are never self-forfeiting, but are grounds only for declarations of forfeiture by the power which makes the grant. And if a declaration of forfeiture by the granting power is delayed then the grant as originally made will

remain in force until such forfeiture is lawfully declared. A citation of authorities to support this elementary statement is unnecessary."

A similar question was presented in the case of Joliet Gas Light Co. v. Sutherland, 68 Ill. App. 230, 233. The company was granted a franchise ordinance by the city of Joliet to lay gas mains and the ordinance provided that the work should be completed within a time limit or the ordinance should be void. The work was not completed within the time set and it was contended that the franchise became void. The court said:

"To the first contention, it is sufficient to say that the only party having a right to insist upon a forfeiture by reason of a nonfulfillment of the condition subsequent, that the plant should be complete by November 1, 1891, was the city of Joliet. The provision requiring the completion of the works by that date or the ordinance should be void, was inserted for the benefit of the city. It nowhere appears that the city has ever sought to avail itself of that provision; but, upon the contrary, has manifested its desire to keep Moran's franchise alive by re-enacting the ordinance in 1892, and by extending the time limit in 1894."

In the case of New York & L. I. Bridge Co. v. Smith, 148 N. Y. 540, 42 N. E. 1088, the charter of the bridge company provided that the bridge should be commenced within two years "or this act and all rights and privileges granted hereby shall be null and void." The work was not commenced within the two years and in an application by the bridge company for the appropriation of certain lands, one of the defendant owners contended that the company had lost its rights through nonuser. The court held that the question of whether a forfeiture clause was self-executing depended upon the language, and that the provision that the rights and privileges granted by the act "shall be null and void" merely meant that the attorney general or other proper official could bring proceedings to void the charter and that the words were used in the sense of voidable only.

However, since the authority for the particular operation concerned herein was questioned, the Commission deems it desirable to confirm in its entirety the order granted to the present petitioner in said order of January 15, 1917.

[4] Counsel for respondent Chicago Surface Lines has contended in this case that because of the form of application filed and the expressions and statements made by certain witnesses in Cases Nos. 6066 and 12513 heretofore heard and passed on by this Commission that it was never contemplated that any operations authorized by the Commission in any one of the geographical divisions of Chicago, generally spoken of as the North, West, and South sides, could be extended into any other division of the city. For example counsel cites that the Chicago Motor Coach Company's operation from Logan Square district on the northwest side to the Loop district in Chicago, via Logan boulevard, Diversey Parkway and Lake Shore drive, is contrary to the understanding of all the parties involved in prior hearings concerning motor coach operation by the Chicago Motor Coach Company in the city of Chicago. Counsel is in error upon this point. It was never the intention of this Commission to segregate operations of the Chicago Motor Coach Company so as to deny it the right to operate from one geographical division of Chicago into another. Such a restriction would destroy its efficiency as a general transportation agency. Colloquially speaking what are known as the North, South, and West sides of Chicago are divided by the course of the Chicago river. As a matter of street numbering Madison street divides the north from the south and State street divides the east from the west. Colloquially speaking there is no east side in Chicago. This Commission in its treatment of motor coach transportation as carried on by the Chicago Motor Coach Company has considered and does now consider all of the divisions of Chicago as an integral part of Chicago—one and indivisible. For rate-making purposes we have recognized certain geographical lines as a test or measure. The shifting of business and social activities may alter such lines even for that purpose. This Commission reserves the right to change routeing and modify rates in matters of public utility transportation without regard to statements or expressions made by witnesses in any prior hearing or to the form of application filed by a petitioner in a prior or present hearing. On necessity it must so act if it conforms to the neces-

sities and conveniences of the public and to the intent of the law.

[5] At the hearings on the petition involved in the present case certain property owners appeared or were represented by counsel who objected to the operation of petitioner's busses on Fullerton Parkway and Lakeview avenue. The Commission is charged with the duty of determining whether "public convenience and necessity" require the proposed routing of petitioner's motor bus operations and this of necessity must eliminate all considerations that are merely private. What will conduce to the general public welfare is the objective to be sought, and manifestly the inconvenience of certain individuals along the thoroughfares concerned cannot affect the subject of the convenience and necessity for transportation facilities for the general public and under the law of Illinois such a factor cannot affect a determination by this Commission of whether the necessities and conveniences of the general public require the granting of the prayer of petitioner herein. (Re Milwaukee Electric R. & Light Co. 189 Wis. 96, P.U.R.1926B, 771, 206 N. W. 201.)

The territory immediately adjacent to and lying west of Lincoln Park along Lincoln Park West, Fullerton Parkway, and Lakeview avenue has been rapidly changing in the past few years from a strictly residential section to a district of large high grade apartments and it seems inevitable that it will soon be almost completely occupied by this type of construction.

Lakeview avenue is a direct continuation or extension of Sheridan Road to the south from Diversey Parkway to Fullerton Parkway immediately contiguous to the west boundary of Lincoln Park between these points. Fullerton Parkway is the extreme easterly portion of Fullerton avenue, intersecting Lakeview avenue and continuing at right-angles thereto it its inter section with Lincoln Park west. From the intersection of Fullerton Parkway and Lincoln Park west a portion of Stockton drive in Lincoln Park runs in a general northerly and northwesterly direction to the intersection of Diversey Parkway and Lakeview avenue where it forms one of the entrances to Lincoln Park. This portion of Stockton drive lies only a short distance to the east of Lakeview avenue from Fullerton Parkway to

Diversey Parkway and at one point there is an opening or entrance into Stockton drive from Lakeview avenue between these points.

Subsequent to the conclusion of hearings upon this matter the commissioners of Lincoln Park passed an ordinance granting to petitioner the right to operate its motor coaches upon Stockton drive between Fullerton Parkway and a point intermediate between Fullerton Parkway and Diversey Parkway and over a connecting driveway between such point and Lakeview avenue. On November 30, 1926, upon motion of petitioner, the Commission reopened this cause and permitted petitioner to file a certified copy of said ordinance and make it a part of the record herein. The operation of petitioner's busses over the thoroughfares permitted in this ordinance will satisfactorily serve the public convenience and necessity and this Commission believes that petitioner should conduct its operations at this point in such a manner.

The Commission having considered all of the evidence produced in the record in this case and the arguments of counsel, and being fully advised in the premises, finds:

1. That this Commission has jurisdiction of the several parties to this case and the subject matter hereof and that the Chicago Motor Coach Company is a public utility for the operation of motor coaches for the carriage of passengers in various portions of the city of Chicago as defined in an act entitled "An Act Concerning Public Utilities," approved June 29, 1921.

2. That public convenience and necessity require that the routing of certain of the operations of the Chicago Motor Coach Company in the city of Chicago as prayed for in the petition as amended and filed herein, and/or as shown by the proof adduced in this case, be authorized and that in so far as the proposed routing involves the use of thoroughfares for which the Chicago Motor Coach Company does not possess any certificate of convenience and necessity from this Commission, the same should be granted.

3. That the Chicago Surface Lines, due to the physical conditions at certain street intersections, as for example, the intersection of North Clark street and Center street, which may be

designated as "Traffic throats" or "control points," and which are now utilized to the limits of their capacity, are not in a position to increase their present operations and are powerless, either by voluntary action or under the order of the Commission, to furnish additional transportation service which the public convenience and necessity of the territory concerned herein requires.

4. That the Chicago Motor Coach Company has adequate financial means to install and conduct the proposed operation and its executives and operatives have heretofore exhibited such ability as to insure the success of the same and that the petitioner has adequate financial resources to pay any damages resulting from any and all accidents due to the negligent use or operation of the coaches which it operates.

5. That the Chicago Motor Coach Company has heretofore substantially exercised the authority granted to its predecessor, the Chicago Motor Bus Company, by the Commission's order of January 15, 1917, and this Commission expressly finds that such order is hereby confirmed in its entirety as of the present date.

MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES.

RE HOLYOKE STREET RAILWAY COMPANY.

[D. P. U. 2931.]

Rates — Powers and duties of Commission — Mandatory character of statute — Street railway.

1. A statute (Gen. Laws Mass. Chap. 159, § 14), requiring the Commission, before it sets aside rates fixed by a carrier, to determine that the same are unjust and unreasonable, and if it be of such opinion, to determine the just and reasonable rates therefor, is mandatory and obliges the Commission to allow such rates as will give a fair return upon the capital employed in the undertaking, p. 579.

Return — Reasonableness determined by salability of stock — Street railway.

2. A public utility should be allowed rates which, under reasonably prudent and economical management, will yield a return sufficient to enable it to sell its shares of stock, since by the laws of the Commonwealth it is obliged to sell them at par or not at all and the ability to serve is thus dependent upon its credit and financial soundness, p. 579.

P.U.R.1928A.

Valuation — Rate making — Security issues — Street railways.

3. An increase of rates was allowed a street railway company on a valuation measured by the oustanding securities, p. 580.

Return — Reasonableness — Percentage allowed — Street railway.

4. An increase of fares was allowed to a street railway company to secure a return of 6 per cent on the value of security issues, p. 580.

Rates — Street railways — Zoning equality.

5. Zone limits were so adjusted as to give patrons from one community along the route as long a ride for the same money as patrons from any other community, p. 581.

Rates — Street railway — Relation of pupil to adult fare.

6. A proposed increase of rates providing for pupils' tickets costing two-thirds as much as adults was so modified that the cost of pupils' fares was practically one-half regular fare in all zones, p. 582.

[October 19, 1927.]

APPLICATION for increased fares; increase ordered.

By the **Commission**: The Holyoke Street Railway Company, on August 1, 1927, filed tariffs with this Commission to become effective August 31. These tariffs provide for an increase in the regular rates of cash fares from 6 cents to 10 cents, with a provision for the sale of four tickets for 30 cents, good for a ride in any one fare zone. They also provide for certain overlaps, for a ride from any part of the central zone, called Section A, to any other part, by the use of transfers when necessary, upon the payment of a 10-cent cash fare, for special tickets between various parts of the system when sold in strips varying from 4 to 5, and for an increase in pupils' tickets from 3 cents to 5 cents when sold in strips of ten.

The effective date when the rates were to go into effect was suspended from time to time, the last suspension being until October 22, 1927. In the meantime, various public hearings were held regarding the reasonableness of the proposed rates. At these hearings, opposition was voiced by representatives of various cities and towns and other organizations both as to the proposed increase and the location of some of the fare limits.

It may be well, in view of the public interest and discussion which has taken place in this matter, to preface our consideration of it with a few fundamental principles which are sometimes lost sight of in the heat of advocacy.

[1, 2] General Laws of Massachusetts, Chap. 159, § 14, re-

quires this Department, before it sets aside rates fixed by a carrier, to determine that the same are unjust and unreasonable, and also requires that, if the Department shall be of such opinion, it shall determine the just and reasonable rates to be charged for the service to be performed. Where the question involved is not one of specific rates, but, as here, of the whole rate structure of the company, this Department is bound to follow the interpretation which has been given to this and similar statutes by the courts of this Commonwealth. There can be no doubt that this statute, which of course is mandatory upon us, interpreted in the light of these decisions, obliges us to permit the carrier to charge such rates as will give it a fair return upon the capital employed in the undertaking. We must perforce, therefore, approach this question in that view of the law. Apart from any question of law, we think it obvious that a public utility ought to be allowed rates under which reasonably prudent and economical management will yield a return upon the capital employed in the enterprise sufficient to enable it to sell its shares of stock.

Under the laws of the Commonwealth a street railway company is obliged to sell its stock at par or not at all. Any policy, therefore, which results in a failure to maintain the value of its stock at par cripples its ability to meet the needs of the community, impairs its credit and, if long continued, results in financial disaster to the company and great inconvenience to the public. So long as the dividends paid on the capital stock of the company are only such as are necessary under prudent management to maintain the credit of the company and its ability to obtain new capital needed in its development, the interests of the company and its passengers are substantially identical. Adequate service cannot be given unless the passengers pay that which is necessary to provide the same.

[3, 4] The outstanding capital of the company has been approved either by this Commission or its predecessors and consists of $1,342,000 of common stock, on which a premium of $276,160 has been paid into the treasury of the company. It requests that it be permitted to charge such rates as will yield a return of 6 per cent upon its investment. During the last

seven years it has paid dividends of 6 per cent on its capital stock, which is equivalent to but 4.98 per cent on its stock and premiums. In the last two years, at least, it has not, in our opinion, made sufficient provision for depreciation, which is a necessary and proper operating expense to be charged against earnings. In the year 1926, while it paid a dividend of 6 per cent, it actually earned but 4.17 per cent on its stock and premiums. For the first six months of this year its passenger revenue was $24,000 less than for the same period last year, and up to the present no dividend has been paid this year. Its passenger revenue in 1926 was $186,000 less than in 1920 and the number of passengers carried in 1926 was approximately 3,000,000 less than in 1920, in spite of the fact thtat in the year 1926 the company operated 112,000 more passenger car miles and 11,500 more passenger car hours than in 1920. If there had been no falling off in the number of passengers carried in 1926, as contrasted with 1920, the company would have received additional revenue under its existing fares equivalent to the proposed increases. It was generally conceded by all at the hearings that the company had been and is giving good service to its patrons and that it has been and is well managed.

The company contended that to earn a net return of 6 per cent on its invested capital, on the basis of last year's earnings and of the first six months of this year, it would need $207,646 additional gross revenue. Based on its own experience and that of other companies, it estimated that the proposed schedule would yield an additional revenue of about $173,006. No reliable evidence was offered to refute this estimate, and, based on the experience of other street railway companies that have increased their fares, we do not think that this estimate is excessive.

[5] There was some contention by representatives of the city of Chicopee and others that under the new schedule the residents of Chicopee were discriminated against in that they did not obtain as long a ride for the same fare as could be obtained by people residing in Holyoke.

We feel that the company should permit passengers to ride from any part of Section H to any part of Section G, and vice

versa, upon the payment of a 10-cent cash fare, issuing transfers therefor, and thus place riders in Chicopee substantially upon a parity with riders in Holyoke. If this should be done, we believe that there would not be any unfair or unjust discrimination.

[6] The proposed schedule provides for the sale of pupils' tickets in strips of ten for 50 cents, each ticket good for one ride in each fare zone. This requires pupils to pay 5 cents for a ride which costs regular patrons 7½ cents. We are of the opinion that pupils' tickets should be issued in strips of ten for 38 cents, to be sold in the manner prescribed in the schedule, each ticket to be good for one ride in each zone or section where a 7½-cent ticket enables a passenger to ride and that pupils' tickets should be sold in strips of ten for 50 cents, each ticket to be good for one ride between points where a 10-cent ticket or a 10-cent cash fare enables a passenger to ride.

When the tariff is amended in accordance with the changes above set forth, we think it should be allowed to go into effect. Accordingly, it is

Ordered, that the tariff filed by the Holyoke Street Railway Company on August 1, 1927, be cancelled, with leave to the company to file an amended tariff carrying out the changes above outlined, and, upon such an amended tariff being filed, it shall become effective forthwith.

MISSOURI PUBLIC SERVICE COMMISSION

RE KANSAS CITY PUBLIC SERVICE COMPANY.

[Case No. 5340.]

Certificates of convenience and necessity — Jurisdiction of Commission — Metropolitan operation — Busses.

1. The Commission has no jurisdiction over motor vehicles operated wholly within the corporate limits of a city, or where the major part of its operating system is within such limits, under an act (Motor Bus Law 1927, § 1) providing that the authority of the Commission over motor vehicles shall not extend to those used for transportation of passengers for hire operating within any municipal corporation or forming a part of the transportation system thereto, p. 584.

P.U.R.1928A.

Certificates of convenience and necessity — When certificate is required — Irregular operation — Busses.

2. The Commission has no jurisdiction to grant a certificate to a motor carrier operating over an irregular route and not between fixed termini where the act giving to the Commission authority over motor busses (Motor Bus Law 1927, § 2) defines motor carriers as operating between fixed termini and over regular routes, p. 585.

[November 18, 1927.]

APPLICATION for certificate of convenience and necessity to operate as motor carrier; denied for lack of jurisdiction.

Ing, Commissioner:

Statement:

The Kansas City Public Service Company of Kansas City, Missouri, filed with this Commission a petition, requesting the Commission to conduct such proceedings as it might deem necessary for the purpose of determining whether the Gray Line Tours operated by said Kansas City Public Service Company is subject to the jurisdiction of this Commission under the Laws of Missouri, 1927, page 402, or any other statute, and to conduct such proceedings as might be necessary for the purpose of determining whether the franchise motor coach operations conducted by the petitioner as a part of its general transportation system in and adjacent to the city of Kansas City, Missouri, is subject to the jurisdiction of the Commission under the Laws of Missouri, 1927, page 402, or any other statute of this state, and if the Commission determines that it has jurisdiction that it grant the petitioner an opportunity to make a showing of the public convenience and necessity of such service, and that the applicant be granted a certificate of convenience and necessity authorizing it to conduct such service.

A hearing was had on this application at the Commission's hearing room at Jefferson City, Missouri, on the 7th day of September, 1927.

Facts:

The petitioner, Kansas City Public Service Company, is engaged in owning and operating a street railway service in the city of Kansas City, Missouri, and in operating some 69 or 70

busses, which supplements the service rendered by its electric cars. This bus service is operated in close conjunction with the service rendered by the electric cars, transfers being given between certain of the street railway lines to the bus lines, and other lines have through routes with no transfers. This service is wholly within the corporate limits of the city of Kansas City, is over regular routes and between fixed termini.

The applicant also conducts a service known as the Gray Line Tours. Counsel for petitioner stated that the Gray Line Tours is an association of sight-seeing bus operators in the various large and important cities of the country, which operate through the Gray Line Association. They pick up passengers at designated points, take them on a circuitous route to points of interest and bring them back to where they got them. It does not pick up or discharge passengers along the route. The Gray Line Tours service is not over a regular route and between fixed termini. During certain seasons of the year the route of the Gray Line Tours will be to certain floral gardens in Kansas City; at other seasons of the year the floral gardens will not be visited, but the route will be through residential districts; in short, there is no regular route and no fixed termini. The Gray Line Tours service extends anywhere within or without the city of Kansas City that the operators may see fit to go.

Conclusions:

This case presents the question of jurisdiction, that is, whether the Public Service Commission of this state has jurisdiction under the 1927 Motor Bus Law, or any other law, to grant a certificate of convenience and necessity to a motor bus operator whose service is wholly within the corporate limits of a city, and the question as to whether the Commission has jurisdiction to grant a certificate of convenience and necessity to a motor bus operator operating over irregular routes and not between fixed termini.

[1] The Public Service Commission has recently decided two cases in which it passed upon both of the propositions referred to. In Case No. 5290, in the matter of the application of the Springfield Traction Company for permission to increase its

motor bus fares, the Commission held that it has no jurisdiction over motor vehicles operated wholly within the corporate limits of a city, or where the major part of its operating system is within the limits of a municipal corporation. The Commission has seen no reason for changing its opinion as expressed in that case and the same ruling will be made in this case. This ruling of the Commission is based upon a provision contained in § 1 of the Motor Bus Law enacted by the Fifty-Fourth General Assembly of Missouri in 1927, which reads as follows:

"This act shall not be so construed as to apply to motor vehicles used in the transportation of passengers for hire, operating over and along regular routes within any municipal corporation or a municipal corporation and the suburban territory adjacent thereto, forming a part of a transportation system within such municipal corporation or such municipal corporation and adjacent suburban territory, where the major part of such system is within the limits of such municipal corporation."

[2] In Case No. 5325, the application of J. W. Worrell of Springfield, Missouri, to operate as a motor carrier over irregular routes and not between fixed termini, the Public Service Commission passed upon the jurisdiction of the Commission to grant certificates of convenience and necessity to such carriers. In that case the Commission held that it had no jurisdiction and will so hold in this case. The reasons for so holding in that case were discussed at length, the substance thereof being that the legislature of this state has passed no law empowering the Public Service Commission to exercise such authority.

The term "motor carrier" is defined by the Motor Bus Law of 1927 as follows:

"The term 'motor carrier' when used in this act means any person, firm, corporation, lessee, trustee, or receiver operating any motor vehicle with or without trailer or trailers attached, upon any public highway for the transportation of persons for hire between fixed termini over a regular route, whether within one city or otherwise even though there may be periodical or irregular departures from said termini or route."

It will be seen that § 2 of the Motor Bus Law of 1927 gives the Commission jurisdiction of "motor carriers," and a motor

carrier is defined by § 1 as being one who operates "between fixed termini over a regular route." There is no statute granting the Commission authority over any other motor bus operators.

The last sentence of § 4 of the 1927 Motor Bus Act refers to operators over irregular routes as follows:

"Provided however, that a certificate of convenience and necessity shall not be required for occasional service over irregular routes not regularly served by motor vehicles under the provisions of this act."

Section 6 of said Motor Bus Law provides that:

"There shall hereafter be levied and collected, in addition to the taxes now provided for by law, upon each motor vehicle used as a carrier of passengers for hire over and along irregular routes and not between fixed termini, a tax equal to one-half of the tax by this section imposed upon motor vehicles of the same capacity used in the transportation of passengers for hire as common carriers along regular routes between fixed termini."

There is no other reference in the 1927 Motor Bus Law to motor bus operations over irregular routes and not between fixed termini, and nowhere in said act is the Commission authorized to grant such operators certificates of convenience and necessity.

For the reasons stated, and which are more fully discussed in the cases herein referred to, the Commission finds that it is without jurisdiction to grant a certificate of convenience and necessity to the applicant for the operation of its franchise motor service within the city of Kansas City or the service of the Gray Tours Line, and that the application herein should be dismissed.

An order in accordance with the views herein expressed will be issued. [Order omitted.]

Brown, Chairman, Calfee and Porter, Commissioners, concur; Hutchison, Commissioner, absent.

P.U.R.1928A.

NEBRASKA STATE RAILWAY COMMISSION.

RE INTERSTATE TELEPHONE COMPANY OF WILSONVILLE.

[Application No. 6780.]

Payment — Gross and net rates — Telephone company.

A telephone company should be permitted to establish gross rates 25 cents in excess of the net rates, the net rate applying when payment is made on or before the 10th of the current month billed, and in case of rural subscribers if payment is made during the first month of the quarter billed.

[July 21, 1927.]

APPLICATION for authority to establish gross and net rate rule; application granted.

By the **Commission:** This applicant asks the Commission's approval to gross and net rates in order to improve collections and reduce expense. The monthly rates now charged by applicant which are affected by this application and heretofore approved by the Commission are as follows:

City business wall type	$1.75
City residence wall type	1.25
Rural wall type	1.25

Applicant asks permission to establish for wall type telephones a gross city business rate of $2 and gross rural and city residence rate of $1.50, the net rate to be represented by the present authorized rate. The net rate is to apply to city subscribers if payment is made on or before the 10th of the current month billed and in case of rural subscribers if payment is made during the first month of the quarter billed.

The 25-cent spread between gross and net rates is one that has been uniformly used by telephone companies in the state and approved by the Commission. The gross and net rate rule has been found to effect a saving to the company by way of lowering collection expenses.

No increased revenue would result from the approval of this application, provided billing is paid by subscribers when due.

The application will be approved.

Note.—Payment.

I. Metering, billing and time of payment, 588.
II. Deposits and guaranties, 588.
III. Discounts and penalties to secure prompt payment, 588.
IV. Refusal of service to enforce payment, 589.

I. Metering, billing, and time of payment.

A water company serving a suburban area should have some store or resident located on or near the tract authorized to receive payment of bills, and not require payment to be made by mail or by calling at the city office. Leatherman v. Consolidated Water & Development Co. (Cal.) Decision No. 15924, Case No. 2151, Feb. 3, 1926.

In Carnaggio Bros. v. Greenwood, No. 25608, 142 Miss. 885, 108 So. 141, April 5, 1926, the court said in its syllabus: "A city operating a public service utility, such as electric lights, water, etc., must furnish such service or commodity to the public under reasonable regulations, and it cannot require an applicant for such service to pay an account made by another person or corporation at the place applied for, in the absence of a statute regulating the power of individuals to make contracts in reference thereto. Ginnings v. Meridian Water Works Co. 100 Miss. 507, 56 So. 450, Ann. Cas. 1914A, 540, cited."

Rural switching charges were required to be paid for yearly in advance. Re Union Teleph. Co. (Wis.) U-3375, Aug. 13, 1926.

II. Deposits and guaranties.

It has been said by the Maine Commission: "A water company may establish reasonable rules requiring a deposit to insure payment from customers who pay in arrears for water furnished at meter rates, or such company may, at its option, require by rule reasonable prepayments. This should be accomplished, however, by the adoption of a rule applicable to all members of a class similarly situated. In the absence of such rule, the company may, as in the instant case, collect its rates at the end of the period for which water is billed. The right to make reasonable rules implies a right to enforce them. If a customer wrongly violates reasonable rules, the company may refuse to serve him, and this principle includes the right to refuse credit to an individual not extended to others similarly situated. In the case of bills honestly disputed, it is not permissible to enforce payment by shutting off the service, as we have seen in the cases cited." Prescott v. Camden & Rockland Water Co. F. C. 685, Oct. 19, 1926.

III. Discounts and penalties to secure prompt payment.

A rule applying to discount for prompt payment of telephone

bills was modified by substituting one providing for an additional charge if bills are not paid promptly. Re Bunker Hill Teleph. Co. (Ill.) No. 15076, March 9, 1926.

A water company was authorized to charge a penalty of 10 per cent of bills not paid within ten days from the date when rendered, where there was a large number of delinquents. Re Elkhart (Ind.) No. 8370, April 2, 1926.

A telephone company was authorized to establish a rule for a penalty when quarterly bills are not paid on or before the 15th day of the second month of the quarter in which service is rendered. Re Tocsin Teleph. Co. (Ind.) No. 8398, May 14, 1926.

The application of a discount or penalty provision to protect a utility from uncollectible bills is reasonable and is usually a matter of company policy. Re Michigan Pub. Service Commission (Mich.) E–105, April 28, 1925.

In Re Shiawassee Teleph. Co. (Mich.) T–236, June 3, 1926, it was provided: "That if said telephone rates, which are to be paid quarterly, are paid by the second month of the quarter no penalty shall be added to the net rates above specified, but if said telephone rates and charges are not paid by the second month of the quarter on which they fall due, a penalty of 75 cents a quarter shall be added to the net rates above specified, and shall be at once due and payable."

In United Fuel Gas Co. v. Kentucky R. Commission, 13 F. (2d) 510, April 22, 1925, in holding that the matter of what discount should be allowed for the prompt payment of bills is peculiarly a matter within the discretion of the company, Hickenlooper, D. J., said: "The function of the Commission, as well as the function of courts of equity and common law in enforcing public utility obligations, would seem to be to fix a maximum, and not a minimum, charge. It is possible, or even probable, that the mere threat of discontinuing service if bills are not paid within a specified period (as in the operation of telephone utilities) would be sufficient to insure prompt payment. What allowance the company will make for prompt payment should be universally applied, so as not to create discrimination; but a rate which is less than the maximum which the company could charge to the dilatory consumer would not seem to be exorbitant. The function of the Commission is to provide against extortionate charges as to any and all consumers, whether prompt or dilatory in payment, and the Commission is not concerned with questions of internal management beyond this point."

IV. Refusal of service to enforce payment.

Service should not be disconnected to enforce payment of a dis-

puted bill when the amount has been deposited with the Commission as provided by the utility rules. Re Susanville Water Co. (Cal.) Decision No. 16292, Case No. 2206, March 25, 1926.

In Re Sutter-Butte Canal Co. Decision No. 16289, Case No. 2126, March 20, 1926, in fixing irrigation rates, the California Commission said: "There appears justification, however, for a basis of discounts for prepayment of succeeding years' service charges to apply to applicants desiring service but one year. Provision will be made for a discount for the prepayment of the second and third years. This will be equivalent to making a rate for one year's service which, for any crop, will be $2.10 per acre more in cases in which service is not used continuously. Landowners, where this prepayment is made, should be entitled to the benefit of prepaid charges in case the land is irrigated for crop production before the expiration of the 3-year period. On this basis a rice grower paying on a one-year basis will pay under the rates herein fixed $10.60 per acre the first year. Should the land be irrigated the next year, the charge on the prepayment basis would be $8.25. If land is rested one year, the charge would be $9.35. If land is off two years, the charge would be $10.60."

A telephone company was held not justified in discontinuing service for the nonpayment of a disputed bill. McCoy v. Illinois Southern Teleph. Co. (Ill.) No. 16846, Jan. 26, 1927.

In Citizens' Gas & Fuel Co. v. Warden, — Ind. —, 149 N. E. 565, Nov. 18, 1925, the appellate court of Indiana, Division No. 2, affirmed a judgment for damages resulting from the discontinuance of gas service, with a resulting damage to merchandise because of freezing, where it appeared that the consumer had paid his gas bill in the morning of a certain day and that in the afternoon the meter had been removed by an employee of the utility who was unaware of the payment.

A water company was authorized to discontinue the service of any patron whose bill is not paid within twenty days from the date it is rendered, where there was a large number of delinquents. Re Elkhart (Ind.) No. 8370, April 2, 1926.

In Re Rossville Home Teleph. Co. No. 8025, Aug. 7, 1925, Commissioner Singleton of the Indiana Commission, in approving an increased telephone rate schedule, said: "The company is required to discontinue service promptly at the end of each quarter, if not paid for within the quarter in which it shall become due, in order that all patrons may be on the same basis of service and payment."

The Maine Commission has said: "It seems to be well settled that where bills for service are admittedly due and the customer unwarrantedly refuses or neglects to make payment, the service may be dis-

continued, but this remedy should be adopted only in clear cases and not where the customer has a reasonable ground for not making payment." Prescott v. Camden & Rockland Water Co. F. C. 685, Oct. 19, 1926.

In Re Kansas City Teleph. Co. (Mo.) Case No. 4732, May 20, 1926, a rule was held to be unreasonable that: "Switching service will be furnished to all subscribers on a line as a whole only and when payment in advance for three months' service is made for the entire number of subscribers on such line. Such service will be discontinued to such line, as a whole, when any part of the charges are due and unpaid;" and the company was required to file a rule "providing for the collection from rural line switching service subscribers either by having the charges paid by the line as a whole in advance, or by the subscribers on the line electing or delegating a secretary, president or other officer to make financial settlements with the telephone company and pay for the switching service during the quarter in which the service is given, ten days' written notice to be given the officer before discontinuing service for nonpayment of charges."

The discontinuance of service to connecting telephone companies was authorized unless the companies paid amounts due on interchange business and filed a bond to secure future collections. Southwestern Bell Teleph. Co. v. Milburn Teleph. Co. (Okla.) Cause No. 7045, Order No. 3260, Dec. 12, 1925.

If the customer defaults in payment of bills or fails to comply with the utility's rules after specific notice has been given, the utility may disconnect service and remove its metering equipment. Re Eagle River Light & Water Commission, U–3400, July 3, 1926.

NEW JERSEY BOARD OF PUBLIC UTILITY COMMISSIONERS.

C. BELLANCA

v.

MIDDLESEX WATER COMPANY.

Payment — Service discontinuance to enforce — Disputed bill.

1. Service should not be discontinued to a patron who refuses to pay a disputed bill for past services when his financial responsibility and honesty are conceded and there is an honest dispute as to the amount owed, especially when the consumer has tendered payment for a subsequent bill, p. 593.

P.U.R.1928A.

Payment — Deposit to insure.

2. A water company continuing service to a consumer pending the settlement of a dispute over a bill for past services may require, if necessary, a reasonable deposit to secure the payment of future bills, p. 593.

[August 4, 1927.]

COMPLAINT to the Commission by one C. Bellanca of excessive water bill and asking injunction against discontinued service; service ordered continued pending court decision.

Appearances: Henry St. C. Lavin, for the complainant; Ambrose Mundy, for the company.

By the **Board**: This matter comes on to be heard upon notice by reason of the fact that Mr. Bellanca complained that a water bill for the total amount of $174 had been rendered him by the company for the period from November 10, 1926 to February 5, 1927; the consumption during which period, as billed by the company, amounted to 59,700 cubic feet of water, which Bellanca claims is excessive.

Prior to hearing the matter was investigated by the Board's staff and a written report (Exhibit R–1) made thereon. This report indicates that Bellanca's service of water began on September 25, 1925, that he paid all bills rendered for service up to November 10, 1926, and that upon receiving the disputed bill for $174 he asked that his meter be tested for accuracy. This was done by the respondent and the meter was found to be registering accurately. An examination of his account as shown by said report and by the actual bills (Exhibits P–1 to P–6 inclusive) indicates that, exclusive of the disputed bill, Bellanca's average monthly use of water from September 29, 1925 to May 1, 1927 was 350 cubic feet costing (at varying rates, however) on the average $2.83 monthly. The disputed bill covered the period from November 10, 1926 to February 5, 1927 or about 2.84 months. Calculation indicates that this was an average monthly consumption of 21,000 cubic feet per month (or 60 times his average consumption during other periods), and that the average monthly cost was $61.27.

The use of water in Bellanca's premises is within his own control and not within that of the company. The meter, as stated, has been tested and found to measure the water correctly, and

this Board does not assume to infringe the right of the company to enforce in lawful manner any claim it may have in the premises in the courts of this state.

[1, 2] But the manager of the respondent goes further than this and claims that the company may seek to enforce the payment of the disputed bill by Bellanca by cutting off his water and thus depriving him and his family and tenants of water until said disputed bill is paid.

The company's manager admits the entire financial responsibility of the complainant as well as his honesty. There seems to be an honest dispute between the utility and the customer as to the amount owed. The principle involved has been enunciated by this Board in Murphy v. Coast Gas Co. 1 N. J. P. U. C. R. 380, and in Hirsch v. Plainfield-Union Water Co. 5 N. J. P. U. C. R. 96, P.U.R.1917F, 38 and such action is supported by the decision in Hatch v. Consumers Co. 17 Idaho, 204, 207, 104 Pac. 670, 40 L.R.A.(N.S.) 263. The court said:

"A regulation that in case a consumer is in default his supply will be cut off is reasonable and may be enforced. But such a regulation cannot be made the instrument by which the water company can become the judge in its own case, or shut off water to enforce payment of a disputed bill; nor by its means can payment be enforced which is not the duty of the customer to make."

The complainant tendered payment for the subsequent water bill rendered and same was refused by the representatives of the respondent.

Under the circumstances disclosed by the record in this case the Board is of the opinion that the disputed bill should be settled in a court of law and that service should be continued to the complainant and that the company should accept payment therefor at the legal rates of the respondent with the right reserved to the company to require, if necessary, a reasonable deposit to secure the payment of such future bills.

If, however, the company should cut off the service of water to the complainant under such conditions the Board will, upon application, issue an order requiring the respondent to restore such service of water forthwith, safeguarded as hereinabove provided.

NEW JERSEY BOARD OF PUBLIC UTILITY COMMISSIONERS.

RE PENNSYLVANIA RAILROAD COMPANY.

Service — Discontinuance — Commutation service — Railroads.

1. Notwithstanding insufficient revenue to defray operating expenses, passenger trains were ordered continued upon showing that morning commutation between certain local cities would be seriously inconvenienced by discontinuance, p. 594.

Service — Discontinuance — Revenue per train — Consideration of total revenues.

2. While the revenue per train is an important element to be considered in the discontinuance of service, the elements of public necessity and total revenue of entire operations may outweigh the former, p. 596.

[October 11, 1927.]

HEARING on proposed discontinuance of certain passenger trains; ordered continued.

Appearances: C. E. Gummere for the railroad company; George W. Pittenger for city of Asbury Park; Thomas F. Burley for Asbury Park Chamber of Commerce; Maurice A. Potter for city of Long Branch; George E. Mace for Trenton Chamber of Commerce.

By the **Board**: The Board having been advised by officials of the city of Asbury Park that effective September 25, 1927, the Pennsylvania Railroad Company proposed to eliminate trains Nos. 807 and 802 between Long Branch and Trenton, hearing was held at Trenton September 20, 1927 and testimony submitted by the objectors and the railroad company. The hearing was continued to September 27th to afford objectors opportunity to offer further testimony as to the necessity for retaining the trains and the railroad company to produce additional data as to number of passengers carried. It was agreed by the railroad company to continue the service until the matter was determined.

[1] Train No. 807 leaves Long Branch at 7:42 A. M. arriving at Trenton 10:02 A. M. and No. 802 leaves Trenton at 8:20 A. M. arriving at Long Branch 10:41 A. M. The distance between Long Branch and Trenton is 60.6 miles. From Long Branch trains operate on tracks of the New York and Long

Branch Railroad to Sea Girt, from latter point to Monmouth Junction on the Jamesburg branch and Monmouth Junction to Trenton on the Main line. Train No. 807 is scheduled to make all station stops between Long Branch and Trenton and train No. 802 all station stops between Trenton and Long Branch.

It was claimed by the representative of the city of Asbury Park that train No. 807 is an important train for passengers from shore points between Long Branch and Sea Girt. This train makes connection at Sea Girt with northbound Central Railroad train No. 3314 for passengers from points south of Sea Girt, destined to points on the Jamesburg branch and the Main line; Jamesburg Junction with eastbound train No. 2502 for points on the Amboy branch; Monmouth Junction with eastbound train No. 212 for points on the Main line, and at Trenton with westbound trains Nos. 217 and 181 for Philadelphia and points south. The importance of retaining train No. 807 was stressed on account of the number of passengers from shore points. As this train carries a considerably greater number of passengers from shore points than train No. 801, it was suggested by the representative of Asbury Park that the latter train could be eliminated with less inconvenience to passengers between Long Branch and Sea Girt than train No. 807. Train No. 801 is scheduled to leave Long Branch at 5:44 A. M., arriving at Trenton at 7:47 A. M., making all station stops.

Statement showing travel on trains Nos. 801, 802, and 807 was submitted showing average number of passengers per day during the months of March, May, and November in 1923, 1924, 1925, 1926, and March and May, 1927. Analysis of the statements shows in some months of 1927 a slight diminution of travel compared with previous years, but not sufficient to conclude that the present value and use of the service is not as great as in previous years. While train No. 807 carries a greater number of passengers from points between Long Branch and Sea Girt, train No. 801 carries a greater number from points on the Jamesburg branch and the Main line. Both trains appear to serve travel on the respective divisions, and to eliminate train No. 801 would undoubtedly result in inconvenience to passengers desiring to be at their place of business about 8:00

A. M. The following train No. 805 from Long Branch does not arrive at Trenton until 8:30 A. M., making all stops on the New York & Long Branch Railroad and four of the principal station stops on the Jamesburg Branch. The elimination of train No. 801 would afford no service from points on the Jamesburg branch to Trenton other than the four points served by Train No. 805 until arrival of train No. 807 at 10:02 A. M. This arrival time would materially affect passengers using train No. 801. The elimination of train No. 802 would afford no morning service from Trenton until leaving time of train No. 804 at 10:06 A. M. This train makes stops at four principal stations on the Jamesburg branch, and following train for other local stations does not leave Trenton until 12:53 P. M.

Statements were submitted by the company showing the earnings of the respective trains and while the volume of business does not produce sufficient revenue to meet operating expenses, it would appear that the convenience of travel using the trains should be given consideration. In the case of train No. 801 it serves the workers and business people who are required to be in Trenton about 8 A. M. and train No. 807 is reasonably patronized and is scheduled to make train connections at four points.

[2] The purpose of the company in eliminating train No. 802 and No. 807 is to reduce operating expenses. While the Board recognizes that revenue per train is an important element to be considered in the discontinuance of train service, the question of public necessity and convenience and the total revenue from operations of the entire system should also be considered. The convenience and necessity for the operation of train No. 802 and No. 807 is apparent and reasonably adequate service would not appear to be afforded if either train is eliminated. The Board, therefore, finds and determines that the service by train No. 802 and No. 807 should be continued.

An order will acordingly issue.

Note.—Service.

I. Jurisdiction of Commission to compel extensions, 597.
II. Abandonment or discontinuance of service:
a. In general, 597.
P.U.R.1928A.

II.—continued.
b. Inadequate return:
1. In general, 597.
2. Return as a whole, 598.
III. Service by particular utilities:
a. Automobiles, 599.
b. Railroad, 600.
c. Street railway, 600.
d. Telephone, 600.
e. Water, 601.

I. Jurisdiction of Commission to compel extensions.

In Thompson v. Indianapolis Street R. Co. No. 9065, Sept. 17, 1927, the Indiana Commission dismissed for lack of jurisdiction a petition of certain citizens requesting the Commission to compel a street railway to extend tracks and service in accordance with an agreement. The question of jurisdiction being raised by the utility, a portion of the opinion of the Attorney General on the matter was quoted as follows: "In my opinion, their [petitioners] remedy lies with the City Council of Indianapolis."

II. Abandonment or discontinuance of service.

a. In general.

In Re Missouri Power & Light Co. Case No. 5262, Sept. 29, 1927, the Missouri Commission approved the permanent abandonment of a section of the applicant's street railway system when experimental bus service for the preceding two months was shown to be both satisfactory and economical.

In Re Lincoln-Nebraska City Coach Line, Application No. 6771, Sept. 17, 1927, the Nebraska Commission approved the application of a bus company to discontinue service into a village along its route. The Commission stated: "Applicant agreed that if the Commission would authorize it to discontinue running into the village of Eagle, it was willing to render service by receiving and discharging passengers at said filling stations on the highway. The Commission is of the opinion and so finds that applicant should not be required to detour into the village of Eagle, but should be required to receive and discharge passengers at the filling stations above referred to on the highway. An order to this effect will be entered."

b. Inadequate return.

1. In general.

In Re Southern P. Co. Docket No. 3092–R–287, Decision No. 4206, Oct. 11, 1927, the Arizona Commission decided that notwithstanding the unfortunate ensuing inconvenience to people in the vicinity of a

certain railroad station because of irregularity of freight shipments and abolition of telegraph service, the revenue at said station was not sufficient to warrant the compelled maintenance by the carrier of the station. The hiring of a caretaker to handle further shipments was ordered.

In Re Southern P. Co. Decision No. 18502, Application No. 11762, June 14, 1927, a petition for the discontinuance of agency service at an unprofitable station was refused because of the wide extent of territory that would be left totally without shipping facilities. The California Commission stated: "We have given full consideration to the record in this proceeding. While the volume of passenger and less than carload freight business at Shingle Springs is not extensive, and it is for these items that the services of an agent are particularly desirable for the patrons of the railroad, a condition would be created if the agency were to be discontinued where no agency facilities would be available for the public over a territory 34 miles in length. In our opinion we conclude such a condition is not in the public interest and the application will, therefore, be denied."

The New Jersey Board of Public Utility Commissioners, in Board of Education of Rockaway v. Wharton & N. R. Co. Oct. 25, 1927, disapproved the discontinuance of certain railroad trains although operation of the same appeared unprofitable. The Board said: "There seems to be no dispute as to these trains being operated at a loss to the railroad company but at the same time they serve a needed convenience for the transportation of school children. Their removal will leave the school children without any transportation except by private car or bus. . . . Mere loss of revenue to the railroad company is not the controlling element in the discontinuance of train service, but some regard must be had for public necessity and convenience. As long as the railroad company retains its charter, it necessarily retains with it the obligation to render reasonable and adequate service."

In Re Johnsonburg R. Co. Application Docket No. 16267, Aug. 23, 1927, the Pennsylvania Commission approved the abandonment of a carrier constructed chiefly for the transportation of a single commodity, timber, upon proof that the section had been thoroughly exploited of that commodity and residuary traffic did not pay operating expenses.

2. Return as a whole.

In Re Geneva, S. F. & A. R. Co. Case No. 4146, Sept. 8, 1927, the New York Commission approved the abandonment of the least profitable portion of an interurban railway system, operating as a whole at a loss, in an effort to put the remainder of the system

upon a paying basis by reason of the economies thereby effected. The abandoned route was approximately 11 per cent of the entire system. Commissioner Brewster said: "If the railroad was making a profit on the entire system, it could be held to a continuance of this line for the convenience of its patrons and the loss absorbed by the profit from the rest of the road. This is not the case, however, and we are faced with the determination of what is best for the interests of all of the public served by the entire road."

In Re Utah Light & Traction Co. Case No. 977, Sept. 14, 1927, the continued operation at a loss, of a certain line of a street railway system earning as a whole a return of 2.08 per cent was deemed unnecessary for public convenience by the Utah Commission.

In Re Utah Light & Traction Co. Cases Nos. 982, 983, Sept. 21, 1927, the Utah Commission granted the application of a street railway utility to substitute busses for electric cars along one of its least profitable routes upon proof that the line was operating at a yearly loss of $7,000 exclusive of deferred maintenance and that the system as a whole was earning but a 2½ per cent return, allowing depreciation. The Commission said: "Again it is anticipated that the use of busses to serve the territory affected by the removal of the street car tracks, will prove just as efficient and dependable, and even more desirable in their service than the street cars now being operated by applicant, and without any added expense to patrons."

In Re Utah Light & Traction Co. Cases Nos. 979, 981, Oct. 15, 1927, the Utah Commission approved the substitution of bus service by a street railway company over a line shown to be operated at a growing loss, with no prospect of improvement, unfairly burdening the return of the entire system. Citizens were also anxious to have the change made because of a proposed boulevard construction the paved surface of which would be much more efficient and safe without the car tracks.

III. Service by particular utilities.

a. Automobiles.

In Re Arizona Transp. Co. Docket Nos. 3095–A–1779, 1646–A–631, Decision No. 4180, Sept. 9, 1927, the Arizona Commission refused to approve the separation of baggage service from the carriage of persons but allowed a sale of the express privileges. The Commission said: "After reviewing the evidence, the Commission is of the opinion that the public convenience and necessity would be served by the transfer of said operative rights in so far as they relate to the transportation of express but is of the opinion and finds that the transportation of baggage is so essentially a part of the transportation of persons that this portion of the rights may not be separated from the certificate granted to a motor vehicle stage line."
P.U.R.1928A.

b. Railroad.

In Seaboard By-Product Coke Co. v. Atlantic City R. Co. Aug. 31, 1927, the New Jersey Board of Public Utility Commissioners decided that a local switching district should not be established unless the density of strictly local freight traffic permitted such a system to be economically and profitably handled by the railroad. The Commission said: "Where, within a small area, there is a large carload movement from one plant to another, the carriers can economically arrange to handle such movement. In the territory around complainant's plant, there is little of such movement. While a very large volume of carload freight is handled by the carriers in the district, it is substantially altogether a movement into or out of the district. The number of cars loaded in Newark, for instance, for delivery in Jersey City, is trifling. There does not appear sufficient reason to establish a switching district as asked by complainant."

c. Street railway.

In Re Anacostia Citizens' Asso. Order No. 680, Formal Case No. 191, Sept. 8, 1927, the District of Columbia Commission, in approving a purchase of new one-man cars with the provision that a corresponding number of old cars of that type be retired, said: "The Commission is of the opinion that as a general principle one-man cars not equipped with automatic treadle rear exits and double front doors to permit of simultaneous entrance and exit *do* not and cannot give satisfactory service for the city of Washington, D. C."

d. Telephone.

In Re Citizens Teleph. Co. Application No. 6640, March 22, 1927, the Nebraska Commission refused the application stating: "The construction of new lines into the territory now served by the Sutherland Telephone Company would result in a duplication of property and expense, and would result in a corresponding additional burden to rate payers. There is no indication of a general demand on the part of the subscribers in the territory in question for service from the applicant."

In Hedlund v. Dalton Teleph. Exch. Informal Complaint No. 7347, March 15, 1927, the Nebraska Commission approved a complaint of the citizens of Dalton asking 24-hour service, but ordered a corresponding increase of rates to make the charges profitable and also approved a differential between rates for wall and desk type equipment.

In Re Lodi Teleph. Co. T-1282, Aug. 10, 1927, it appeared that Mr. Warren was a new tenant upon a farm served for fifteen years by the Poynette Telephone Company and upon his removal there he desired to change to service by the Lodi Company since all of his local

business and social relations were in Lodi. Most of his neighbors had Poynette service and he was situated one-half mile from the nearest Lodi Company connection. The Poynette Company objected that Mr. Warren's property was connected to 1 mile of line serving only one other subscriber and if service to him were discontinued they would be obliged to maintain the whole wire for a single subscriber, and further that Mr. Warren was only a tenant and subsequent tenants might desire to resume Poynette service. The Lodi Company promised to waive objection to the change should such situation arise. The Wisconsin Commission said: "In view of the fact that the Lodi Company is willing to waive objection to the restoration of service at this location by the Poynette Company at any time, it is believed that the desires and necessities of the subscriber should be given considerable weight, even though he is a tenant on the premises. No substantial duplication of line will result from the desired extension."

e. Water.

In Neklason v. Ratterree Bros. Decision No. 18619, Case No. 2304, July 13, 1927, the California Commission ordered the defendant utility which supplied water to a realty subdivision to submit within twenty days plans for substantial improvement of service. Notwithstanding the fact that some improvement had been attempted, evidence showed that the small diameter of the mains and other pipes could never be made to render satisfactory service to a section in which demands due to increasing population were daily growing.

NORTH DAKOTA BOARD OF RAILROAD COMMISSIONERS.

RE HUGHES ELECTRIC COMPANY.

[Case No. 2578.]

Payment — Meter deposit — Burden of proof.

1. The burden of justifying a meter deposit is upon the utility proposing such a charge where a protest is made, p. 603.

Payment — Meter deposit — Necessity — Practice elsewhere.

2. The fact that a meter deposit is in effect in numerous places in a state is not conclusive as to its necessity or reasonableness in all cases, p. 603.

Payment — Meter deposit — Effect of customer ownership of meters.

3. The fact that the majority of the consumers of an electrical utility own their own meters raises a question as to the propriety of a meter deposit, p. 604.

[November 10, 1927.]

P.U.R.1928A.

HEARING upon the protest of the filing of a meter deposit charge by an electric utility; schedule cancelled.

Findings of Fact, Conclusions and Order

Milhollan, President: By schedules filed with the Commission, the Hughes Electric Company of Dickinson, North Dakota, propose to require a service or meter deposit charge applicable in the city of Hebron, North Dakota. A vigorous protest was filed by the users of the service, whereupon the Commission suspended the rates pending investigation. Due to conditions over which we have no control it was necessary to further suspend the proposed charges for a period extending over several months. After due notice the matter came on for hearing at Hebron on September 7, 1927, the following appearances being entered:

G. A. Renden, appearing on behalf of the utility; S. P. Rigler, P. S. Jungers, E. O. Murray, Emil Krauth, and Fred Schweigert, appearing on behalf of the city of Hebron and citizens, as protestants.

The Evidence

The Hughes Electric Company is engaged in the manufacture and distribution of electric current for lighting, heat and power, with general offices in Bismarck. It serves a large portion of western North Dakota, generating electricity at central points and distributing it to a large number of small cities, including the city of Hebron. Its general manager stated that the city of Hebron was the only point on its transmission line where they did not now require a meter deposit or service charge and that they had recently charged off a sum amounting to $260 in bad accounts for Hebron. No further showing with respect to the reasonableness of the proposed charge or the necessity therefor was made by the electric company.

The protestants undertook to show that practically all of the inhabitants of Hebron were property owners and that their credit with the commission houses and others was good. The record clearly indicates that the protestants knew little or nothing of the nature and purpose of a meter deposit or service

charge, it being generally regarded by the said protestants as a method of obtaining working cash capital. However, the principal contention of the protestants was that the meters were the property of the consumer and that the said consumers had owned and maintained their meters since the construction of the plant years before its acquisition by the Hughes Electric Company, and that no service charge was, therefore, necessary. There is no specific denial of the contention that the meters are the property of the consumers and we must assume that their statement is correct.

The rules of the Commission, promulgated June 1, 1920, after notice and hearing, provide that a utility may require from all consumers or prospective consumers, subject to approval of this Commission, a cash deposit. The utility is required to pay interest thereon at the rate of 6 per cent per annum, payable upon return of the deposit, or annually upon demand by the consumer. The utility is required to keep an accurate record showing the name of the consumer making such deposit, the premises occupied by the consumer, the amount and date the deposit was made, and the day or dates payment of interest shall have been paid. The rules further provide that a utility shall issue to every customer from whom a deposit is received a certificate of deposit that shall receive the approval of the Commission.

[1, 2] It is not, therefore, mandatory upon a utility to require a meter deposit or service charge. When it is proposed to make such charge and a protest is made, the burden of justifying the charge is upon the utility. The fact that such charges are in effect in numerous places in North Dakota is not conclusive as to its necessity or reasonableness in all cases. In other words, we feel that each case should be governed by its own facts and circumstances. We can conceive of instances where a utility would lose large sums through bad accounts were it not for the imposition of a meter deposit or service charge. Since a reasonable amount of such losses are under given circumstances chargeable to operating expenses, it would seem to be in the interest of the public that a reasonable charge be made. However, we need not discuss this matter at length.

[3] It is the general custom for a utility to own and maintain the meters. We have in some instances required the utility to purchase and maintain the meters owned by consumers, recognizing this equipment to be just as essential to the proper operation of the plant as any of its units. The fact that the majority, if not all, of the consumers in Hebron own their meters, raises a question in our minds as to the propriety of this charge. Furthermore, the record is conspicuously silent as to the reasonableness of the charge proposed to be made.

We are, therefore, of the opinion and find that the Hughes Electric Company has failed to justify the meter deposit or service charges under suspension, and that such schedule should be cancelled without prejudice, and

It is so ordered.

PENNSYLVANIA PUBLIC SERVICE COMMISSION.

IRVIN RINEBOLD et al. trading as Kirwan Taxi Company

v.

HARLOW S. WEBB.

[Complaint Docket No. 7204.]

Certificates of convenience and necessity — When required — Call and demand or auto livery service.

An owner of automobiles referring to his business as that of an auto livery, devoting his entire time to the business and maintaining an office or headquarters, upon the front of which, facing the public sidewalk, he has a sign advertising an auto livery and bearing his telephone number and a hand pointing to the door of the building, also carrying a similar advertisement in the telephone directory, his cars being parked less than 300 feet from a railroad station, and clearly visible to persons passing along the street, was held to be operating a taxi business unlawfully without a certificate when he operated at uniform rates, although claiming to make an individual bargain with each patron who came to his office, it further appearing that if someone came to the office and requested to be carried to a particular place, and others not accompanying the first patron also applied to be taken to the same destination, he would carry all of them up to the capacity of his vehicle.

[June 14, 1927.]

COMPLAINT alleging the operation of automobiles in call and demand service without a certificate; complaint sustained and order issued requiring discontinuance of such service.

By the **Commission:** Complaint is filed by a number of taxicab operators of Towanda, averring that respondent is there operating two automobiles in "call and demand" service without a certificate of public convenience therefor. It is admitted by respondent that prior to June 28, 1926, he operated motor vehicles as a common carrier for the transportation of passengers on call and demand in Towanda under a certificate of public convenience duly issued by this Commission; that he was convicted of transporting liquor in one of the cars operated under this certificate; and that upon his application for renewal of the certificate the Commission on June 28, 1926, issued its report and order refusing such renewal.

Complainants' testimony is to the effect that following the issuance of this order by the Commission, respondent moved his office diagonally across the street at the main street intersection of the borough, and has continued in business exactly as he did prior to that date. Respondent, however, contends that he has changed his business from that of taxi service to that of automobile livery.

It is stated by complainants and not denied by respondent that the taxi operators in Towanda, including complainants, ordinarily refer to their business as that of "auto livery." Respondent devotes his entire time to this business and maintains an office or headquarters in a restaurant, upon the front of which, facing the public sidewalk, he has a sign advertising himself as an auto livery and bearing his telephone number and a hand pointing to the door of the building. He carries a similar advertisement in the telephone directory, just as he did during the period when he operated under a certificate. Respondent's cars when not in use are parked at the side of his office immediately adjacent to the sidewalk, and the entire establishment is less than three hundred feet from the railroad stations in Towanda, and clearly visible to persons passing along the street from them.

In our opinion, respondent's business as conducted by him is not that of a livery. While he claims to make an individual bargain with each patron, his own testimony and that of his driver show that his rates are uniform for the same distances, and that on out of town trips his rate is based on a charge of so much per mile. He admits that rates are not mentioned by him until the end of the carriage unless the passenger asks for the information beforehand. He further admits that if someone comes to his office and requests to be carried to a particular place, and others not accompanying the first patron also apply to be taken to the same destination, he will carry all of them up to the capacity of his vehicle and make a uniform charge for the carriage, even though they are utter strangers.

While it is not claimed that respondent, since the refusal to renew his certificate, attempts to solicit patronage on the street, the Commission is satisfied from respondent's advertising, the place in which he keeps his vehicles, and the manner of his dealings with those who apply for service either in person or by telephone, that he is still carrying on his former taxi business and, therefore, finds that respondent has been operating since June 28, 1926, as a common carrier of passengers by motor vehicle without a certificate of public convenience therefor from this Commission. An order will accordingly issue directing respondent to forthwith cease and desist the operation of said vehicles in common carriage.

PENNSYLVANIA PUBLIC SERVICE COMMISSION.

LEHIGH VALLEY TRANSIT COMPANY

v.

FRED ERB.

[Complaint Docket No. 7252.]

Public utilities — Duties — Automobile carriers.

1. No operator in the transportation field can divest himself of his responsibilities to the larger public merely by stipulation, formal or informal, with a part of the community, p. 609.

P.U.R.1928A.

Public utilities — Test of status — Extent of service — Automobiles.

2. The test of public utility status is not met by limitations as to the extent of the public that will be served, p. 609.

Public utilities — What constitutes — Automobile carrier.

3. A motor transportation business operated between specified points for a regular and unsolicited clientele upon informal agreements terminable upon notice by either party, is common carriage subject to Commission jurisdiction, p. 609.

[October 31, 1927.]

COMPLAINT by railroad carrier against alleged illegal operation and competition by motor carrier; operation ordered discontinued.

By the **Commission:** Complainant transit company is a street railway corporation which, in addition to transporting passengers, carries freight and merchandise from Philadelphia to Bethlehem, Allentown, and Easton, and in the reverse direction. It has available for this service eleven 40-ton freight cars and makes two trips in each direction daily. The Reading Company is the operating lessee of a steam railroad between Philadelphia and Bethlehem. It has the customary interline arrangements with other rail carriers for forwarding freight originating in Philadelphia and points on its line to Allentown and Easton. The Reading Company petitioned the Commission for intervention and was made a complaining party. The respondent is a motor truck operator.

It is alleged that respondent is operating motor vehicles as a common carrier of freight, merchandise, and other property between the city of Philadelphia and the cities of Allentown and Bethlehem without a certificate of public convenience. The answer filed by Erb denied that he is a common carrier and averred that he is merely a private carrier and accordingly not subject to the jurisdiction of the Commission.

Considering first the exceptions pressed by respondent's counsel to rulings of the examiner, we do not deem it necessary to pass on the exceptions for the reason that the Commission has disregarded all evidence relating to movements of respondent's trucks on February 5, May 12, 13, and 17 and has given consideration to the fact that the respondent in 1923 began his operation under written contracts with consignors.

The sole question in this proceeding is whether or not the business activities in which respondent is engaged constitute what is comprehended in the term "common carrier" as defined in § 1 of Article 1, of the Public Service Company Law. This can be determined from the showing and disclosure of the respondent himself. He has never obtained a certificate of public convenience from the Commission. He launched his business in November 1923, transporting by motor truck over the highways between the cities named and he now operates three trucks, two of 5-ton capacity, one of lesser capacity. He is not indiscriminate but selective both as to his patrons and as to the character of the goods to be handled. At the inception of his enterprise he contracted in writing with consignors but at the present time all but a few of his arrangements are embodied in verbal, but fairly definite, understandings. One of the distinctive ingredients in all of his relations with consignors or consignees is that notice, either written or oral, is necessary to terminate the arrangement, but either he or the other party can exercise this right, which apparently is in no way circumscribed. He has built up a patronage of some twenty-five consignors and consignees located in Philadelphia, Allentown, Bethlehem, and Easton. He refused to transport from a foundry located at an intermediate point. According to his testimony, he is unwilling to accept commodities from any concerns or persons other than those named during the course of the hearings. All of his customers solicited him; he had never taken the initiative in this respect. He does not seek business through solicitors by advertising, through the mails or by means of any of the customary forms of publicity. His only telephone listing is a private telephone at his residence. He maintains a receiving station at 119 North Front Street, Philadelphia, but there is no telephone listing of this. He maintains no places for receiving goods in Allentown, Bethlehem, or Easton, but calls at the places of business of the consignors. The variety of goods and articles carried is wide, embracing such commodities as sugar, groceries, canned goods, vinegar in barrels, paints, frames, parts of machines, and small machinery, textiles, paper, and printed matter, etc. His rates are based on weights actually

carried; there is no testimony that he is ever compensated on a time basis or in some blanket amount.

[1–3] On this showing of respondent, his counsel contends that he is not to be classed with common or public carriers. Emphasis is placed on the fact that he confines his activities solely to the wholesale jobbers and retailers for the time being under contract relationship with him, and that he does not hold himself out generally for business. We cannot accept the position taken by respondent or agree to the infallibility of the tests thus suggested and urged. Obviously no operator in the transportation field can divest himself of his responsibilities to the larger public merely by stipulation, formal or informal, with a part of the community. If the conditions, circumstances, methods of operation, etc., thus created, or arising in spite of these understandings, clearly characterize the operations as other than private transportation, they belong within the sphere of public or common carriage. Wayne Transp. Co. v. Leopold, 12 P. C. R. 429, P.U.R.1924C, 382. The limitations imposed regarding the number of shippers served or the nature and quantity of commodities accepted may well be consistent solely with the number, capacity, and style of vehicular equipment and with the facilities and personnel obtainable by the respondent at some particular time. Moreover there is judicial authority that the test is not met by limitation as to the extent of the public that will be served. Piercely v. Public Service Commission, 73 Pa. Super. Ct. 212. None of the authorities which counsel for respondent has ably assembled indicate that the "holding out" must necessarily be active or direct. Doubtless replacements and additions in patronage are made by recommendations by and references from shippers already in contact with him. If a carrier for profit is by circumstances available to a portion of the consignors and consignees of a given territory who are willing to make more or less the same arrangements as prevail with existing patrons, it cannot be said that this carrier has so circumscribed his field of operations that he must be regarded as a private carrier. Respondent's business under the limitations narrated has grown from five concerns in November 1923 to over twenty-five in May 1927, less than four years. At this rate of expansion he would

four years hence be serving over one hundred patrons and if his reasoning is to prevail he would even with such extensive patronage still remain unamenable to the Public Service Company Law.

The Commission is convinced that the business conducted by the respondent under the testimony as summarized is common carriage undertaken and conducted by the respondent without the approval of this Commission as evidenced by its certificate of public convenience. The allegations of the complaint are sustained and a cease and desist order will issue.

WISCONSIN RAILROAD COMMISSION.

RE WESTBY TELEPHONE COMPANY.

[U-3557.]

Return — Telephones — Amount.

1. A telephone rate schedule estimated to produce a return of substantially 8 per cent was approved, p. 611.

Rates — Telephone — Installation charge — Instrument in place.

2. A telephone company should not make an installation charge when the instrument is in place at the time the subscriber commences to take the service, although such a charge is permissible where no instrument is in place, this charge, less amounts owing by the patron, to be refunded if service is continued for two years, p. 612.

Payment — Deposit to guarantee.

3. A telephone company may require of customers subscribing for service for whom it is not necessary to install an instrument, a deposit to guarantee collection of bills and to hold such deposit or any portion of it not required to be applicable to delinquent accounts for a period of two years, p. 612.

[June 3, 1927.]

APPLICATION for authority to increase telephone rates; application granted.

By the **Commission**: Petition in this case dated March 24, 1927, states that the present lawful rates of the Westby Telephone Company do not provide revenues sufficient to meet operating expenses and provide a reasonable return on the investment, and requests authority to establish a new rate schedule.

The existing rates of the company, together with the revised schedule proposed in its petition, are tabulated below:

	Present Rates	*Proposed Rates*
Local business	$1.75 per month	$2.00 per month
Local residence	1.25 " "	1.50 " "
Extension telephone	.75 " "	1.00 " "
Rural telephone	3.75 per quarter	4.50 per quarter

The above rates are gross; the existing and proposed discount rules are identical, namely:

Local—25 cents discount if paid during the current month.

Rural—75 cents discount if paid during the first month of the current quarter, 50 cents during the second, and 25 cents during the third month.

The company also desires to file the following prepayment rule:

A deposit of $3 will be required before the telephone is installed, and same will be refunded to the subscriber at the end of two years if the telephone is still in service, and the account is paid in full.

Hearing in the matter was held at Madison, Wisconsin, on April 21, 1927, at which J. M. Storkerson and George S. Beyer appeared in behalf of the company. No appearances were entered in opposition.

Our investigation indicates that the company is not unreasonable in its request for increased rates. In 1924 the return on the capital investment was but 4.5 per cent, in 1925 the return was 5 per cent, and in 1926 dropped again to 4.5 per cent. The company is setting up approximately 5 per cent for depreciation, an amount not out of line with common practice, and its operating expense is very moderate. The investment per station is approximately $69 which is not abnormal for the character of the utility's equipment.

[1] The proposed increment of $3 per year per station will increase the company's revenue by $2,472. The 1926 revenue available for return was $2,590.43 and the expected return under the new rates would, therefore, approximate $5,000 or substantially 8 per cent of the capital investment.

The rates which the company desires to place in effect are

rather unusually low for a utility of its size and character and will, it appears, yield no more than a fair and just return. Our order, accordingly, will provide for their establishment.

The prepayment rule which the company proposes is in the nature of a combined surety payment and installation charge. It was brought out at the hearing that the intention is to apply this charge to all new subscribers whether or not the new subscriber's premises were previously equipped with telephone service.

[2] The decision of the Commission under which telephone companies are authorized to make an installation charge prohibits the making of such charge where the instrument is in place at the time the subscriber commences to take the service. The rule as proposed by the company, therefore, cannot be adopted but rules as modified by the order in this case appear reasonable.

It is therefore *ordered* that the Westby Telephone Company be, and the same is, hereby authorized to discontinue its existing rates and substitute therefor the rates as proposed in its petition and set forth in the text of this decision.

It is *further ordered* that the company may make a charge of $3 for installing a telephone where no instrument is in place at the time the subscriber commences to take service, this charge, less any amount which the subscriber may be owing the company at the end of two years, to be refunded to the subscriber if he continues to use the service for two years.

[3] It is *further ordered* that the company may require of customers subscribing for service subsequent to the date of this order, for whom it is not necessary actually to install an instrument, a deposit of $3 to guarantee collection of bills and to hold such deposit, or any portion of it not required to be applicable to delinquent accounts, for a period of two years.

WISCONSIN RAILROAD COMMISSION.

RE PRENTICE MUTUAL TELEPHONE COMPANY.

[U-3632.]

Service — Duty to serve — Service dependent upon stock investment — Telephones.

1. The requirement of a public utility that prospective subscribers take stock in the company in order to receive service from its lines is unlawful on the theory that a utility cannot require subscribers to share in the responsibility of the organization and it may not impose such conditions upon the granting of service, p. 614.

Discrimination — Concessions to subscribers having contract — Telephones — Contact rental.

2. The rates of a telephone utility to an isolated subscriber must at least be reasonably proportionate to the cost of supplying service over his line regardless of an agreement by the utility whereby a contact rental was paid instead of constructing a line extension in accordance with a prior agreement, p. 614.

[November 11, 1927.]

APPLICATION for increase of telephone rates to one subscriber; approved.

By the **Commission**: Application was filed September 13, 1927, by the Prentice Mutual Telephone Company for authority to either increase its rates for telephone service supplied one subscriber at Catawba Village or remove the telephone and line.

The lawful rate of applicant now in effect is $1.25 gross, $1 net per month. Application is made to increase the rate to $3 net per month to the Catawba subscriber or be given authority to remove the line.

Hearing was set for October 6 at Madison. There were no appearances.

Applicant submits a statement setting forth its view of the situation as follows:

The Catawba subscriber's station is located about six and one-quarter miles distant from the nearest station at Pennington on a 9-party line extending from Prentice to Catawba. This line was originally attached to poles owned by the Chippewa Valley Telephone Company but now owned by the Wisconsin Telephone Company and the annual cost for pole contacts of 5

cents each and switching charges of $3 per telephone have been increased to 15 cents per contact and $6 per year per telephone.

The subscriber located at Catawba, the Beyer-Morner Lumber Company, submits that it made an agreement with the telephone company at the time the lumber company was organized to purchase stock in the telephone company so that it would be supplied with telephone service. The practice of the utility, the subscriber states, was to serve all stockholders purchasing two and one-half shares of stock and that subscriber purchased extra shares of stock in consideration of and in payment of supplying service the extra distance from Pennington to Catawba. The increase in rates from 50 to $1 per month voted by stockholders, it is stated, was for the purpose of constructing its own lines to all subscribers including the Beyer-Morner Lumber Company at Catawba. The latter line was not constructed, it is stated, but the increased contact rental paid instead, such increased rental being the result of the telephone company's failure to carry out its agreement and representation to the subscriber. This subscriber contends that to increase its rental will be inequitable and in violation of the contract heretofore existing between the utility and the subscriber.

[1] This Commission has always held that the requirement of a public utility, that prospective subscribers take stock in the company in order to receive service from its lines, was unlawful on the theory that a public utility could not require a subscriber to share in the responsibility of the organization. The Prentice Mutual Telephone Company is not a purely mutual company in that it renders service to some twelve subscribers who are not stockholders and hence is serving other than its own members. Under the ruling of the supreme court, therefore, it is a public utility and may not lawfully impose such conditions upon the granting of service to subscribers as that requiring that any future subscriber shall take out stock in the company, thus making it mutual and nonpublic in character.

[2] The only question in the Commission's mind relative to approving the $3 per month rate is whether a rate as low as this is not unjustly discriminatory against other subscribers. However, the record does not establish that the rate proposed

will throw an undue burden on the other subscribers, although it is clearly below the cost to the company at this time. There appears to be a possibility, however, that at some future time the rate approved must be revised in view of the increased cost of operating the line serving the Catawba subscriber. Even though the company built its own line instead of paying contact rental, the fixed charges alone on the line would exceed the amount it is proposed to charge.

MISSOURI SUPREME COURT, DIVISION NO. 2.

STATE EX REL. MISSOURI PACIFIC RAILROAD COMPANY

v.

PUBLIC SERVICE COMMISSION OF MISSOURI et al.

[No. 27827.]

(— Mo. —, 297 S. W. 47.)

Crossings — Establishment of viaduct — Factors for consideration.

1. The fact that local needs may not require an overhead crossing is not controlling in the determination of a Public Service Commission as to the necessity for establishing the same where the route thus served is a link in the program for an extensive highway system, p. 618.

Appeal and review — Procedure — Burden of proof — Presumption for Commission.

2. The burden of proof is placed by statute (§ 10535, R. S. 1919) upon the party adverse to the Commission, in a suit to review an order of the latter, to shew by convincing evidence that the order complained of is unreasonable or unlawful, p. 619.

Crossings — Highway viaducts — Expense of approach construction.

3. Approaches are part of a bridge for purposes of apportionment of construction expense, p. 620.

Constitutional law — Procedure — Waiver of constitutional objections.

4. In proceedings to review an order of the Public Service Commission, an objection to the constitutionality of an amendment (§ 10459, p. 322, Laws 1925) upon which the order is based is waived if not raised at the earliest possible stage of the proceedings, p. 620.

Constitutional law — Equal protection — Class legislation — Cost of viaduct.

5. An amendment (Laws 1925, p. 322) providing that the Public

Service Commission may not impose more than one-half of the cost of viaduct construction upon the highway commission, thereby permitting one-half of the cost to be apportioned to the railroad, is not unconstitutional as class legislation discriminating against the carrier, because prior to the amendment all of the cost could have been allotted to it and the amendment is general in its application, p. 621.

[June 23, 1927.]

APPEAL from circuit court decision approving order of Public Service Commission on certiorari; affirmed.

Appearances: James F. Green, of St. Louis, for appellant; D. D. McDonald and J. P. Painter, both of Jefferson City, for respondents.

Higbee, C.: This is an appeal by the relator, the Missouri Pacific Railroad Company, from a judgment of the circuit court of Cole county, affirming an order of the Public Service Commission requiring the construction of an overhead crossing at a point where the public highway will cross the relator's railroad track in Iron county.

The State Highway Commission has surveyed and laid out the highway referred to as a part of the state highway system of connected hard-surfaced public roads, ordained and established by § 29 of the Laws of Missouri, Extra Session of 1921, pp. 131, 145, 153, and designated said highway as routes 21 and 49. On September 10, 1925, the State Highway Commission filed and application with the Public Service Commission of Missouri requesting permission for the construction of an overhead crossing at a point where state highway No. 49 crosses the relator's right of way in Iron county. Quoting from the appellant's brief:

"The railroad company in its answer denied that it was essential that there should be an overhead crossing at the place designated, and requested the Commission, in the event that it decided that an overhead crossing should be constructed, to only require the railroad company to pay a portion of the cost of the viaduct proper, excluding from the apportionment the highway approaches to the viaduct outside of the railroad right of way. The Commission, after a hearing, made its order granting the application for the proposed overhead structure, the cost of the same being approximately $32,000, and assessed one-half of the

cost thereof against the railroad company. The Commission based its decision on the ground, as stated therein, that the cost of separating grade crossings was fixed by the statute (Session Acts 1925, p. 322), as follows:

" 'In all cases of the state highways, not more than one-half of the cost of construction of any grade separation, overhead or underpass, authorized or ordered by the Commission, shall be apportioned to the State Highway Commission.' "

The railroad company filed its motion for a rehearing, alleging that the order of the Commission was unreasonably burdensome, and that the act of the legislature above quoted was unconstitutional and void, as class legislation. The motion was overruled, and the case was taken by writ of certiorari to the circuit court of Cole county, where the judgment of the Public Service Commission was approved.

The evidence shows that route 49 begins at the village of Glover, in Iron county, and runs south about 15 miles to Annapolis, a village with a population of 176 in 1920. It is a "Federal aid" project, and known as a secondary route, through a sparsely populated section. Iron county had a population of 9,458 in 1920. The construction of this highway and overhead crossing will eliminate eight grade crossings. The length of the viaduct over the railroad right of way is about 127 feet, the length of the east approach is 273 feet, and that of the west approach is 473 feet; the total length being about 873 feet. The estimated cost of the viaduct proper is $13,163.21, and that of the approaches is $17,157.69.

The evidence for the relator was that a grade crossing might be located over the right of way and tracks at a very small cost; very little business was done in the vicinity of the proposed crossing, people living there being engaged in cutting ties and mine props, and the highway is located in a very hilly portion of the county; that the construction of the viaduct will necessitate changes in the signal apparatus of the company which will cost about $1,000, and changes in the telegraph wires and lines which will cost about $529.

Appellant's first contention is that route 49 traverses a sparsely populated region where there is little business, and that a grade

crossing over the railroad track will adequately meet all reasonable requirements, that the railroad company will derive no benefit from the construction of an overhead crossing, and that the order requiring the company to pay one-half of the cost imposes an unreasonable and unnecessary burden on the appellant.

[1] As we read the record, route 49 is a new highway in process of construction. It is a connecting link in the state highway system of hard-surfaced public roads. Section 10459, R. S. 1919, as amended by Laws 1925, p. 322, reads, in part:

"1. No public road, highway or street shall hereafter be constructed across the track of any railroad corporation at grade, nor shall the track of any railroad corporation be constructed across a public road, highway or street at grade, . . . without having first secured the permission of the Commission. . . .

"2. The Commission shall have the exclusive power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, apportionment of expenses, use and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public road or highway by a railroad or street railroad and of a street by a railroad or vice versa, so far as applicable, and to alter or abolish any such crossing, and to require, where in its judgment, it would be practicable, a separation of grades at any such crossing heretofore or hereafter established, and to prescribe the terms upon which such separation shall be made and the proportion in which the expense of the alteration or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the state, county, municipality or other public authority in interest: Provided, however, that in all cases of the state highways, not more than one-half of the cost of construction of any grade separation, overhead or underpass, authorized or ordered by the Commission shall be apportioned to the State Highway Commission."

Paragraph 1 forbids the construction of a public road over the track of a railroad at grade without first having secured the permission of the Commission. The fact that the local needs

may not require an overhead crossing is not controlling. Route 49 is a Federal aid project; it is a link in the state highway system, connecting that portion of the state with the city of St. Louis, in the construction of which the state is expending large sums of money, and over which it may reasonably be assumed there will constantly be considerable vehicular travel. The report of the Commission finds:

"That route 49, when completed, will afford an outlet for traffic to a considerable territory. Traffic originating in Oregon and Carter counties, and parts of Shannon, Ripley, Wayne, and Butler, will have an outlet to St. Louis and the north, and this road will serve as a connecting link over which tourists from both north and south will pass."

It further finds that it would not be feasible or practicable to establish a grade crossing at the point of the proposed viaduct; and, as has been seen, the construction of the overhead crossing will eliminate eight grade crossings.

[2] It is true that the order of the Commission may be reviewed, but it is provided that:

"The burden of proof shall be upon the party adverse to such Commission, or seeking to set aside any determination, requirement, direction or order of said Commission, to show by clear and satisfactory evidence that the determination, requirement, direction, or order of the Commission complained of is unreasonable or unlawful as the case may be." Section 10535, R. S. 1919.

The test is: Is the order of the Commission unreasonable or unlawful? State ex rel. St. Joseph v. Busby, — Mo. —, P.U.R.1926A, 803, 274 S. W. 1067; State ex rel. Wabash R. Co. v. Public Service Commission, 271 Mo. 155, 196 S. W. 369; Chicago, B. & Q. R. Co. v. Public Service Commission, 266 Mo. 333, 341, P.U.R.1916B, 367, 181 S. W. 61; State ex rel. Kansas City Power & Light Co. v. Public Service Commission, 310 Mo. 313, P.U.R.1926A, 783, 275 S. W. 940, 946.

The order of the Commission requiring the construction of the overhead crossing is in harmony with the declared public policy of the state. There is nothing in the evidence tending to prove that in the circumstances of this case the order is un-

reasonable or unlawful. Chicago, R. I. & P. R. Co. v. Public Service Commission, — Mo. —, 287 S. W. 617, 619 and cases cited.

[3] The second contention is that, under § 10459, R. S. 1919, the approaches should not be considered as a part of the bridge or overhead crossing. Appellant's learned counsel cites St. Louis v. Terminal R. Asso. 211 Mo. 364, 386, 109 S. W. 641. When that case is read, it will be found to be an authority against appellant's contention. In 9 C. J. 421, it is said:

"Both at common law and usually under our statutes, a bridge includes the abutments and approaches necessary to make it accessible and convenient for public travel."

Numerous cases, including St. Louis v. Terminal R. Asso. *supra,* are cited in support of this proposition. In 4 R. C. L. 194 (2) it is said:

"A bridge is usually regarded as a complete passageway, and includes whatever makes it accessible. Therefore, the approach of a bridge for a reasonable limit is regarded by law as a part of the bridge itself. . . . Not infrequently an approach may be considered as a part of a bridge for one purpose and not for another. For instance, an approach has been held not to be a part of a bridge within the meaning of a limitation of speed, for the reason that, while it may be regarded unsafe to cross a bridge faster than a certain speed, it may be regarded perfectly safe to exceed the same speed limit on the approach."

This overhead crossing is made necessary by the railroad track. Paragraph 2 of § 10459, R. S. 1919, provides:

"The Commission shall have the exclusive power to determine and prescribe the manner, including the particular point, of crossing and . . . apportionment of expenses."

That is, the Commission has power to determine the plans and specifications of the structure necessary to carry the highway over the railroad; this necessarily includes the approaches. In a like case, Chicago, R. I. & P. R. Co. v. Public Service Commission, *supra,* we held that the approaches are necessary parts of an overhead crossing, without which the viaduct would not be a crossing.

[4] The third and last contention is that the amendment to

§ 10459, p. 322, Laws 1925, is unconstitutional and void as class legislation. In the statement of the case we set out the appellant's summary of the answer filed in the case before the Commission. The constitutionality of the amendment to § 10459 was first called in question in the motion for rehearing:

"It is the general rule that constitutional questions must be raised at the earliest possible stage of the proceedings, or they will be regarded as waived. Speer v. Southwest Missouri R. Co. 264 Mo. 265, 267, 174 S. W. 381; State v. Gamma, 215 Mo. 100, 103, 114 S. W. 619." State v. Cox, — Mo. —, 259 S. W. 1041.

The application to the Public Service Commission for the location and establishment of the proposed overhead crossing prayed—

"the Commission to allow and prescribe the terms of the installation, operation, and maintenance of said crossing, and apportion the expenses thereof in such manner between the parties interested as may be just and proper."

Under § 10459, *supra,* the Commission had power to charge the entire cost of the crossing to the state or to the railroad company, or to apportion the cost between the state and the railroad company. By the amendment, which appellant challenges as unconstitutional, it is provided that not more than one-half of the cost of construction shall be apportioned to the State Highway Commission. It is manifest that the constitutionality of the amendment was not raised at the earliest possible stage of the proceedings, and must be regarded as waived.

[5] The constitutionality of § 10459 before its amendment is not challenged. In Chicago, R. I. & P. R. Co. v. Public Service Commission, *supra,* we cited authorities, including State ex rel. Kansas City Terminal R. Co. v. Public Service Commission, 308 Mo. 359, 374, P.U.R.1926A, 210, 272 S. W. 957, 961, that in the constitutional exercise of the police power of the state the Commission had power to impose the entire cost of an overhead crossing on the railroad company. In Missouri P. R. Co. v. Omaha, 235 U. S. 121, 127, 59 L. ed. 157, 35 Sup. Ct. Rep. 82, 83, the Court held:

"That a railway company may be required by the state, or

by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, and that the consequent cost to the company as a matter of law is *damnum absque injuria,* or deemed to be compensated by the public benefit which the company is supposed to share, is well settled by prior adjudications of this court."

The futility of the plea that the amendment to § 10459 is special class legislation and void is apparent, for it is clear that the Commission had power to impose one-half the cost of the overhead crossing on the appellant by the terms of § 10459 before it was amended. However, waiving the failure to raise the constitutional question by a timely plea, the act relates to all grade crossings of railroads by state highways, and is not special or class legislation.

"It is held generally that a statute is not special or class legislation, if it applies to all alike of a given class, provided the classification is not arbitrary. Miners' Bank v. Clark, 252 Mo. 20 [158 S. W. 597]; State ex rel. Applegate v. Taylor, 224 Mo. 393 [123 S. W. 892]." State ex rel. Moberly Special Road Dist. v. Burton, 266 Mo. 711, 720, 182 S. W. 746, 749; Myers v. Kennedy (in banc) 306 Mo. 268, 277, 267 S. W. 810, 813; Hicks v. Simonsen, 307 Mo. 307, 270 S .W. 318; State ex rel. Garesche v. Roach, 258 Mo. 541, 561, 167 S. W. 1008.

From a consideration of the record, we are of the opinion that the order of the Commission is supported by substantial evidence, that it is in line with the declared policy of the state, and that it is reasonable and just.

The judgment is accordingly affirmed.

Davis and Henwood, Commissioners, concur.

Per Curiam: The foregoing opinion by Higbee, Commissioner, is adopted as the opinion of the court.

All concur.

Motion for rehearing denied July 13, 1927.

OKLAHOMA SUPREME COURT.

BEN BARBOUR et al.

v.

A. T. WALKER et al.

[No. 17218.]

(— Okla. —, 259 Pac. 552.)

Constitutional law — Police power — Use of highway for carriers — Automobiles.

1. Chapter 113, S. L. 1923, providing for the regulation of the use of the public highways of the state by motor carriers for hire through the limitation of that use by the rule of public convenience and necessity, is a valid and constitutional exercise of the police power of the state to promote the public good, to preserve the public peace, and to protect the public welfare, and said act is not in contravention of any rights of the citizen guaranteed to him by the 14th Amendment to the Constitution of the United States, nor by § 7 of Article 2 of the Constitution of Oklahoma, p. 625.

Public utilities — Test of status — Irregular schedules — Automobiles.

2. A private motor carrier operating over the public highways of the state, though without regular or fixed time schedules, between fixed points in the transportation of commodities for hire under separate contracts with several principal business concerns located and doing business in one of such points, is a "motor carrier," within the meaning of Chap. 113, S. L. 1923, and is subject to control and regulation by the provisions of law therein provided, p. 633.

[September 13, 1927.]

Headnotes by the COURT.

APPEAL from order granting temporary injunction; affirmed.

Appearances: John E. Luttrell, of Norman, for plaintiffs in error; F. H. Reily, of Shawnee, for defendants in error.

Teehee, Commissioner: On February 3, 1926, plaintiffs secured a temporary injunction against the defendants upon a petition wherein plaintiffs, in substance, alleged that they were motor carriers for hire, engaged in transporting commodities between the cities of Oklahoma City and Shawnee over state highway No. 3, for which purpose they had secured a proper certificate of public convenience and necessity from the State Corporation Commission, and had paid the proper license fee,

and had otherwise complied with the provisions of chapter 113, S. L. 1923, regulating the use of motor carriers for hire upon the highways of the state; that defendants were likewise operating motor carriers between said points and over the same route without having secured from the State Corporation Commission a certificate of public convenience and necessity, and were otherwise operating without compliance with the provisions of said chapter 113, and that thus they were operating in competition with plaintiffs and depriving them of revenue of which they were justly entitled by virtue of their compliance with said chapter 113; that defendants' operations of their motor carriers constituted a public nuisance, and a menace to the common users of said highway, and an imposition on the just and lawful rights of plaintiffs, by reason whereof plaintiffs' business suffered irreparable damage and injury, for the redress of which, by reason of defendants' insolvency, plaintiffs were without an adequate remedy at law. Wherefore they prayed a permanent injunction against said defendants.

Defendants by answer admitted the allegations of plaintiffs' petition, but denied infraction of the law as alleged. They further answered that they were associated in the transportation of freight and merchandise between the points mentioned under separate contracts with five individuals and firms in Oklahoma City; that they did not hold themselves out to the public as common carriers, nor did they intend to solicit other business from other persons; that such freight and merchandise was transported to the city of Shawnee for their employers, either for storage in storage plants furnished by said defendants for redelivery when sold, or originally to purchasers of said commodities doing business in the city of Shawnee, and that they were so operating without any regular or fixed time schedules; that being operators, as private carriers, they were not subject to the provisions of said chapter 113. Wherefore they prayed denial of plaintiffs' petition. Upon demurrer that part of their answer relating to storage of commodities was stricken.

Upon hearing, both parties introduced evidence in substantiation of their respective pleas. It further developed that the concerns with which the defendants held contracts were of the

principal business houses engaged in their respective line of commodities in Oklahoma City.

The court found the issues for the plaintiffs and adjudged that they were entitled to a temporary injunction pending the further order of the court, to which judgment defendants excepted, and upon superseding said judgment brought the cause here for review.

In the trial of the case plaintiffs contended that, as holders of certificates of public convenience and necessity, they were entitled to injunctive relief; that chapter 113 was broad enough to and did include all persons operating motor trucks for hire in the manner alleged, whether such persons were engaged as common carriers or as private carriers. Defendants contended that the act does not regulate private carriers not engaged as common carriers. The judgment of the court in granting the temporary injunction was, in effect, a determination that defendants were in fact motor carriers, within the meaning of chapter 113, and were thus subject to control and regulation thereby.

[1] In this court defendants, for reversal of the judgment, contend, first that they are private carriers, and that as such they are not within the purview of Chap. 113, S. L. 1923; and, second, that if said chapter 113 is operative as to them the said act is unconstitutional and void as in violation of their rights under the 14th Amendment to the Constitution of the United States, and under § 7 of article 2 of the state Constitution.

We will consider these contentions together as they may be properly resolved into the one general proposition; namely, that defendants have the right as private motor carriers to the use of the public highways of the state for private enterprise and profit, without let, hindrance, or interference from the public authorities of the state.

The constitutionality of chapter 113 has heretofore received consideration by this court in the case of Ex parte Tindall, 102 Okla. 192, 229 Pac. 125. The law was there challenged on the identical grounds here relied on. Upon a thorough analysis of the act which need not here be reiterated, its validity was sustained.

In addition to what was there said as to the purpose and necessity of the law, we may here well observe that, prior to the advent of automotive power, regulation of the use of the public highways was not essentially required as no phase of the public welfare was either inconvenienced or exposed to danger as now, though they were used for both common travel and private gain, particularly between points where there were no railroad facilities. Construction and maintenance of the highways then were left to county and township organizations, with the financial means therefor raised largely, if not altogether, by local taxation. Public use thereof was not as marked then as now, for the traveling public found it convenient to pass to their destinations by means of travel by rail rather than by the horse power vehicle. With the advent of the automobile, our mode of travel was transformed in less than a decade. This transformation required a change in our system of highway construction from that of the ordinary improvised dirt roads to that of highly improved and hard-surfaced roads. This accelerated the establishment of our state highway department whereunder we are now expending millions of dollars annually to meet the requirements of the traveling public. Speed laws were found to be necessary to maintain order and to minimize danger in the use of the highways. In addition to the primary purposes, that of accommodation of the traveling public in the common acceptation of the term, utilization of our highways, constructed and maintained at large public expense, by transportation thereover of both passengers and property for private gain developed even between points where railroad facilities were available, and on that scale where regulation of the use of our highways for private enterprise became a necessary function of government, for, if not so regulated, appropriation thereof for private purposes would eventually place the public in the position of furnishing the highways for private enterprise rather than for the public purposes for which they were established.

To obviate this condition, rapidly materializing, the legislature in its wisdom, in protection of the public welfare, enacted chapter 113 and other provisions of law not here necessary to notice. The law is based upon the theory that the individual

citizen has no vested right to use the highways of the state for private enterprise to the detriment of the general public, and that where the individual interest conflicts with the public interest, as must be the necessary result in the use of the public highways for private purposes without regulation, the government is never impotent to protect the public welfare.

The principle applied in the regulation of the use of the highways for private enterprise rests upon public convenience and public necessity, a principle recognized and in a large degree applied by the national government in placing the control and regulation of the railroads of the country in the hands of the Interstate Commerce Commission. Title 49, "Transportation," Chap. 1, § 1, p. 1649, U. S. C. 1926.

It was upon this theory and the application of this principle that this court in Ex parte Tindall, *supra,* held that the state was within the rightful exercise of its police power in the regulation of the use of the highways in sustaining the constitutionality of the law here again challenged, and denied that it in any wise was in contravention of either the 14th Amendment to the Federal Constitution as in abridgment of any right or privilege of the citizen, or in deprivation of property without due process of law, or in denial to the citizen of the equal protection of the law, or of § 7, art. 2, of the state Constitution on the same subject. It was there also held that the real purpose of the act was "to regulate the use of public highways by transportation companies" through "the regulation and control of motor vehicles, operating as common carriers for hire and profit over the public highways," and that:

"The operation of motor vehicles, for the purpose of carrying passengers and freight, for hire and profit over the public highways as a transportation roadbed, is a 'public service enterprise' within the constitutional definition of such an enterprise, and as such, subject to regulation and control by the state."

In addressing itself to the administration of the law through the State Corporation Commission charged therewith, of which it was also complained was the lodgment of arbitrary power with the Commission, the court used this language:

"It would be impossible for the Commission, acting under such act, to grant a special privilege detrimental to the interests of the public or to create a monopoly with like effect. The public has a voice in the enforcement of this act and the right to speak whenever its interests are not subserved. It has a right to say that no person or corporation shall use its public highways as a 'transportation line' for hire; it has a right to say that any one who may be permitted to operate over such lines in such manner must have a license to do so, and has a voice as to whether its necessities and convenience require that one, two, or three shall be licensed to render the required service, or that none is required. It might be a material benefit to the public to have one transportation line over a given highway, and a substantial detriment to have more than one, hence the limit to the number is determined by the public needs. It is not that the petitioner or any other private concern has a vested right or any right to appropriate the public highways to its own free use and benefit for profit, but that the public, from the standpoint of its convenience and necessities, as well as from the standpoint of property rights in the public highways, may demand a 'public service' if it needs it, or reject it if it is not needed, and a voice as to how much of such service it needs and the conditions under which it may be rendered, and no private rights are paramount to the public good." (*Supra,* at p. 201 of 102 Okla.)

In Ex parte Dickey, 76 W. Va. 576, P.U.R.1915E, 93, 96, 85 S. E. 781, L.R.A.1915F, 840, we find this apt expression of the court:

"The right of a citizen to travel upon the highway and transport his property thereon, in the ordinary course of life and business, differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain, in the running of a stage coach or omnibus. The former is the usual and ordinary right of a citizen, a common right, a right common to all, while the latter is special, unusual and extraordinary. As to the former, the extent of legislative power is that of regulation; but as to the latter, its power is broader, the right may be wholly denied, or it may be permitted to some

and denied to others, because of its extraordinary nature. This distinction, elementary and fundamental in character, is recognized by all the authorities:

" 'A distinction must be made between the general use, which all of the public are permitted to make of the streets for ordinary purposes, and the special and peculiar use, which is made by classes of persons in the pursuit of their occupation or business, such as hackmen, drivers of express wagons, omnibuses, etc. Tiedeman on Municipal Corporations, § 229.

" 'The rule must be considered settled that no person can acquire the right to make a special or exceptional use of a public highway, not common to all citizens of the state, except by grant from the sovereign power.' Jersey City Gas Co. v. Dwight, 29 N. J. Eq. 242; McQuillin, Municipal Corporations, § 1620."

This principle has been applied many times. Liberty Highway Co. v. Michigan Pub. Utilities Commission (D. C.) 294 Fed. 703, and many other cases there cited, including Ex parte Dickey, *supra*.

In Kane v. New Jersey, 242 U. S. 160, 61 L. ed. 222, 37 Sup. Ct. Rep. 30, we find this language:

"The power of a state to regulate the use of motor vehicles on its highways has been recently considered by this court and broadly sustained. It extends to nonresidents as well as to residents. It includes the right to exact reasonable compensation for special facilities afforded as well as reasonable provisions to insure safety."

While in that case neither the right of private use nor the principle of public convenience and necessity as the measure of such use were present, yet, under the reasoning of the court, there would seem to be no good ground, where private use would tend to be inimical to the public good as would be inevitable without regulation, to deny the power of the state to measure the extent of that use by the convenience of the public and the necessity for transportation facilities. In the law involved, the state in its sovereign capacity was dealing with a subject over which it appears to us, in every view of the case, it had control. In the construction and maintenance of the highways now available to the traveling public, the state has expended millions of dollars,

and is still continuing to cobweb the state with hard-surfaced highways for the accommodation and convenience of her citizens and all those who find it convenient to pass her way. In the enactment of this legislation no rights of any of her citizens have been contravened, for the law does not restrict the common right of the citizen to use the public highways for purposes of travel, and it does not comport with reason to say that the use of them for private gain may be exercised alike by all as it is certain that such a situation will never arise. Our view of the right of the state to enact this legislation and of the relation of the citizen thereto is best expressed by the Supreme Court of the United States in Davis v. Massachusetts, 167 U. S. 43, 42 L. ed. 71, 17 Sup. Ct. Rep. 731, wherein was involved the right of the citizen to the undisturbed use of Boston Commons, when the Court said that:

"The 14th Amendment to the Constitution of the United States does not destroy the power of the states to enact police regulations as to the subjects within their control (Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 29, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; Jones v. Brim, 165 U. S. 180, 182, 41 L. ed. 677, 17 Sup. Ct. Rep. 282), and does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the Constitution and laws of the state."

We, therefore, regard the case of Ex parte Tindall (102 Okla. 192, 229 Pac. 125) as conclusive upon the propositions here involved, unless, as defendants contend, that by virtue of their being private motor carriers and having never held themselves out to the public as common carriers, the case of Frost v. Railroad Commission, 271 U. S. 583, 70 L. ed. 1101, P.U.R.1926D, 483, 46 Sup. Ct. Rep. 605, 47 A.L.R. 457, is controlling. That case involved the constitutionality of the law of the state of California, similar in many of its provisions to chapter 113. The state case is reported in 197 Cal. 230, P.U.R.1926B, 218, 240 Pac. 26.

Briefly, the facts in that case were that Frost & Frost Trucking Company had a single contract to transport citrus commodities for the Redland Orange Growers' Association from Redlands to Los Angeles. The Railroad Commission of California, corresponding generally in duties to that of our State Corporation Commission, was charged as here with the administration of the law there involved. Complaint was made before it that the transporting company was operating without a certificate of public convenience and necessity, whereupon it was cited to show cause why an order should not be issued requiring it to desist in its operations in violation of law. The law classified motor carriers as common carriers, subject to regulation as such. The company contended, as here, that it was engaged in a private enterprise and was without the purview of the statute, and that if it was held to be within the provisions of the law, then the law, as to it, was invalid as in contravention of the Fourteenth Amendment to the Federal Constitution and like provisions of the state Constitution. Upon hearing, the Commission denied these contentions and rendered judgment accordingly.

The company appealed to the state supreme court and there renewed its contentions. The state court sustained the Commission and declared the act to be constitutional. The company, by appropriate proceeding, brought the case to the Supreme Court of the United States for review.

In the state court it was the theory that the law was not in fact a regulation of the use of the highways, but a regulation of the business of transportation companies, it being said that

The Auto Stage and Truck Transportation Act [St. 1917, p. 330, as amended by St. 1919, p. 457], regulating transportation companies, including private carriers, is not in fact a regulation of the use of the highways, nor does it take private property for public use without compensation in violation of Const. Cal. art. 1, par. 13, and Const. U. S. Amend. 14, nor does it violate the due process clause; but what the act does, in effect, is to make a conditional offer of a special privilege.

The national court, in passing upon the validity of the law, held that this view and construction of the act by the state court

was binding upon it, and thus the question of the regulation of the use of the public highways for private gain was not squarely presented to the high court.

The effect of the state's construction of the law was that a private motor carrier operating under a single contract was converted into a common carrier by legislative fiat, and this the national court denied as being in contravention of the due process clause of the 14th Amendment. And following up the state's theory, the court further held that it was not within the power of the state to grant a privilege which required the relinquishment of a constitutional right.

Thus the distinction between the California case and Ex parte Tindall, *supra,* the case here controlling, is clear, in that the California law was held to be a regulation of the business of a private carrier, whereas the law in this state is a regulation of the use of the highways by motor carriers. Moreover, a further distinction appears between the California case and the one now in hand, as in that case the transportation company was operating as a private carrier under a single contract with a single concern, while in the case at bar the defendants were operating under five separate contracts with as many different firms dealing in different classes of commodities on a large scale.

In concluding the opinion, the national court made this observation:

"The court below seemed to think that, if the state may not subject the plaintiffs in error to the provisions of the act in respect of common carriers, it will be within the power of any carrier, by the simple device of making private contracts to an unlimited number, to secure all the privileges afforded common carriers without assuming any of their duties or obligations. It is enough to say that no such case is presented here; and we are not to be understood as challenging the power of the state, or of the Railroad Commission under the present statute, whenever it shall appear that a carrier, posing as a private carrier, is in substance and reality a common carrier, to so declare and regulate his or its operations accordingly." (*Supra,* P.U.R. 1926D, at p. 493).

[2] This language of the court is pertinent here, and indeed is most persuasive to support the conclusion reached by the trial court, that, since the defendants were operating under five separate distinct contracts with as many principal concerns of Oklahoma City, they had in effect resolved themselves from the character and status of private motor carriers not subject to regulation, if such in fact was the case, to that of public motor carriers, and thus by their own conduct of their enterprise had completely brought themselves within the provisions of law regulating the use of the public highways for private gain.

In view of the dissimilarity of the theory of that case with the Tindall Case, *supra,* and likewise in the facts with the case at bar, as above pointed out, it is our judgment that the principles laid down by the Supreme Court of the United States in Frost v. Railroad Commission, *supra,* are not here controlling. For these reasons, therefore, we conclude that the judgment of the district court was right, and it is accordingly affirmed.

Bennett, P. C., and Reid, Leach, and Foster, Commissioners, concur.

Per Curiam. Adopted in whole.

VERMONT SUPREME COURT.

RESIDENTS OF ROYALTON et al.

v.

CENTRAL VERMONT RAILWAY COMPANY.

(— Vt. —, 138 Atl. 782.)

Appeal and review — Procedure — Time limitation — Commission power to reform order.

1. The Commission may amend an order erroneously dated to conform to facts where an appeal from the same has been thereby dismissed by the supreme court because of a failure to file within twenty days and which in fact has been seasonably filed, p. 636.

Appeal and review — Procedure — Time limitation — Correction of Commission order.

2. A motion for appeal seasonably filed from a corrected date of a Commission order will be considered regularly presented to the court where the record of the case discloses no evidence contrary to the action of the Commission in reforming the date of the order, p. 636.

Commission — Jurisdiction to issue injunction — Agency station service.

3. The Public Service Commission has jurisdiction (G. L. 5050, 5231) to entertain a petition to restrain a railroad from substituting inferior accommodation at an agency station, p. 637.

Appeal and review — Scope — New grounds to support Commission ruling.

4. A Commission ruling on appeal will be sustained, if possible, on legal grounds which were not urged in inferior proceedings, contrary to the rule if a reversal were sought under the same circumstances, p. 637.

Evidence — Exclusion of secondary evidence — Contents of letter.

5. An offer to show by oral testimony the contents of a letter, the absence of which was unaccounted for, was properly excluded by the Commission, p. 638.

Evidence — Exclusion of inadmissible testimony — Materiality dependent on time.

6. Testimony of an incident was correctly excluded as improper where its materiality depended upon the time of its occurrence which was not offered in proof, p. 638.

Evidence — Hearings — Testimony of statements of an employee — Admissibility.

7. Testimony as to what an employee said were the duties of his employment is inadmissible against his employer at a Commission hearing until his authority to speak concerning the matter is established by other than his own declaration, p. 639.

Evidence — Hearing — Excluded testimony — Showing of expected testimony.

8. An exception to an exclusion of evidence at a hearing by the Commission is unavailing unless an offer was made to show what was expected to be proven, p. 639.

Evidence — Scope of proceedings — Cross-examination — Irrelevant questions.

9. In a Commission proceeding to restrain a railroad from substituting care-taker for agency service at a certain station, an objection to a question, on cross-examination of a witness for the carrier, asking whether the proposed economy could not be effected by making the substitution at some other station, was properly sustained as having no bearing on the issues at hand, p. 639.

Evidence — Hearings — Admissibility of testimony — Waiver of exception.

10. Inadmissible testimony permitted by the Commission over the

valid objection that the witness is not qualified to give such evidence is rendered harmless if the witness is later allowed to testify to substantially the same thing without objection, p. 640.

Evidence — Wrongful admission of written testimony — Error cured.

11. Erroneous admission into evidence by the Commission at a hearing of a prepared report in corroboration of a witness' testimony over the valid objection of the opposition was not prejudicial error where the only controverted matters contained therein were already substantially placed in evidence by the oral testimony of the witness without dispute, p. 640.

Appeal and review — Sufficiency of evidence to support Commission findings.

12. Unchallenged findings being found sufficient to support the judgment of the Commission, the exceptions to its other findings were not deemed necessary to be considered, p. 641.

Service — Railroads — Stations — Elements to be considered — Quality of service.

13. The kind of service to which patrons of a railroad station are entitled does not depend alone on their convenience or the self-supporting status of the station, but of equal importance are the elements of cost of service, volume of business, and the proximity and accessibility of other stations, p. 642.

Service — Duty to serve — Statutory requirement for equal facilities — Railroad stations.

14. A statutory provision (G. L. 5231) requiring equality of accommodations furnished by a railroad must be construed to mean "reasonable" as well as "equal" facilities, taking into consideration the due proportions and requirements of stations of different size and doing different amounts of business, p. 642.

Appeal and review — Conclusiveness of Commission findings — Treatment of evidence.

15. The assumption is that the Commission made proper use of the evidence before it for all legitimate purposes, and a mere statement by the Commission claimed to be immaterial to the issues in the case, does not warrant an inference to the contrary, p. 644.

Appeal and review — Scope of review — Findings not solicited at hearing.

16. Exceptions to the failure of the Commission to make certain findings will be overruled on appeal where the record fails to show any requests for such findings, p. 644.

[October 5, 1927.]

APPEAL from order of Commission; affirmed.

Argued before Watson, C. J., and Powers, Slack, Fish, and Moulton, JJ.

Appearances: George L. Hunt, of Montpelier (John F.

Neal, of Boston, of counsel), for appellants; Robert R. Twitchell, State's Attorney of Woodstock, for the state; H. H. Powers, of St. Albans, and J. W. Redmond, of Newport, for appellee.

Slack, J.: This is an appeal from an order of the Public Service Commission dismissing a petition brought by citizens of Royalton and vicinity seeking to restrain petitionee from substituting caretaker service in lieu of the present agency service at its Royalton station. The order is predicated on facts found and stayed by the Commission.

[**1, 2**] It appeared from the record first before us that petitioners' motion for an appeal was not filed within twenty days from the date of the Commission's order and at the January term, 1927, the appeal, on motion of petitionee, was ordered dismissed. Thereupon petitioners, claiming that the order appealed from was erroneously dated, asked and had leave to have the same amended, and the case was entered with the court. An amended order was filed February 21, 1927, which is dated August 31, 1926, instead of August 27, 1926, the date of the original order. Reckoning from the date of the amended order, petitioners' motion for appeal was seasonably filed. That the Commission had authority to amend its order to conform to the facts cannot be doubted. Castonguay v. Grand Trunk R. Co. 91 Vt. 371, 100 Atl. 908, although an action at law, is authority for this. The petitionee contends, however, that the findings of the Commission respecting this matter do not disclose error in the original order which the Commission had power to correct, and says in its brief that it seasonably appealed from the action of the Commission in holding otherwise. But the record before us, which determines the questions for review, discloses nothing concerning such appeal, or the finding of the Commission, if any, regarding the alleged error. For aught that appears the amendment was properly made, and, if so, petitioners' motion for appeal was filed within the time prescribed by statute.

The petitionee contends that the Commission did not have jurisdiction of the subject-matter of the petition, and, therefore, that the order dismissing it should be sustained. The petitioners

insist that the Commission had jurisdiction, under both G. L. 5050, and G. L. 5231. The former section, so far as here material, reads as follows:

"Said Commission shall have jurisdiction on due notice to hear, determine, render judgment, and make orders and decrees in all matters provided for in the charter of any railroad corporation, or in the statutes of this state relating to railroads, and shall have like jurisdiction in all matters respecting; . . . IX. The manner of operating railroads and conducting the business thereof so as to be reasonable and expedient and to promote the security, convenience and accommodation of the public and to prevent violations of law and unjust discriminations, usurpations, or extortions."

General Law 5231, reads as follows:

"A person or corporation operating a railroad shall give to all persons reasonable and equal terms, benefits, facilities, and accommodations for the transportation of themselves, their agents and servants, and of merchandise and other property, upon such railroad, and for the use of the depots, buildings, and grounds thereof, and, at any point where such railroad connects with another railroad, reasonable and equal facilities of interchange."

[**3, 4**] We doubt not that subdivision IX of § 5050 gives the Commission jurisdiction of the subject-matter here involved. And it seems equally clear that the provision of that section which gives the Commission jurisdiction in all matters provided for "in the statutes of this state relating to railroads" is broad enough to include questions arising under G. L. 5231. The petitionee insists that the question of whether the Commission had jurisdiction of the subject-matter of the petition under the provisions of the statutes last referred to is not for consideration here because not raised before the Commission. Assuming the facts to be as claimed, the ruling of the Commission will be sustained if it can be done on any legal ground (Goupiel v. Grand Trunk R. Co. 94 Vt. 337, 111 Atl. 346), although the rule is as claimed by petitionee where a reversal is sought on grounds not raised below (Wood v. James, 93 Vt. 36, 106 Atl. 566).

In the trial before the Commission the petitioners excepted

to the exclusion of evidence offered by them and to the admission of evidence offered by petitionee. The petitionee insists that these exceptions are not before this court because not saved in the manner provided by G. L. 1520, and cites Vermont Marble Co. v. Eastman, 91 Vt. 425, 101 Atl. 151, and Rowley v. Shepardson, 90 Vt. 25, 96 Atl. 374 (to which might have been added Osha v. Higgins, 90 Vt. 130, 96 Atl. 700, and Barber v. Bailey, 86 Vt. 219, 84 Atl. 608, 44 L.R.A. (N.S.) 98), in support of this claim. The manner of saving exceptions to the admission or rejection of evidence in trials before a chancellor has been changed since those cases were decided. See G. L. § 1511, the last sentence of which provides:

"Exceptions taken on the trial of controverted questions of fact before a chancellor shall be available on appeal in the same manner as in county court causes tried by the court."

The effect of this statute was pointed out in Essex Storage Electric Co. v. Victory Lumber Co. 93 Vt. 437, 108 Atl. 426. And in Gray v. Brattleboro Trust Co. 97 Vt. 270, 122 Atl. 670, it was held that the method prescribed by the latter statute for saving exceptions in trials before a chancellor is exclusive. But it should be noted that exceptions so saved will be unavailing unless the case is properly here on appeal perfected in the manner provided by G. L. 1561. United States of America v. Cano, 100 Vt. 111, 135 Atl. 1. We think these exceptions were properly saved.

[5, 6] On the direct examination of one Toomey, petitionee's station agent at Royalton, petitioners offered to show that the witness received a letter from some one, in which the writer said, in effect, that he wanted to ship lumber from the Royalton station, and complained that the condition of the freight yard crossing was such that he could not do so, and asked the witness to take the matter up with the petitionee; that the witness did so, but that the petitionee did nothing about it, and the shipment went elsewhere. This was excluded, subject to petitioners' exception. The offer in part was, in effect, to show by parol the contents of a letter which evidenced the foundation of what was claimed to have occurred after its receipt by the witness without accounting for the nonproduction of such letter. Then, too, for

aught that appeared from the offer, the incident might have occurred in the early part of the witness' service as such agent, which it had already appeared covered a period of eleven years, and, if so, it was clearly immaterial to any issue before the Commission. The exception is without merit.

[7, 8] The same witness, after testifying in direct examination that he had had a talk with one Thresher, who, he knew, was in the employ of petitionee and, he thought, was its traveling agent, about the duties of a caretaker at the Royalton station, was asked to tell what Thresher said about such duties, and also what he said as to why he approached the witness about the matter. This was excluded, to which petitioners excepted. What Thresher said about the duties of a caretaker was inadmissible until his authority to speak concerning that matter was established, which could not be done by his own declarations, and we find no other evidence tending to show such authority. Moreover no offer was made as to what petitioners expected to show, without which the exception is unavailing. Capital Garage Co. v. Powell, 99 Vt. 244, 131 Atl. 10.

[9] Edwin Deschenes, who, it appeared, was petitionee's comptroller and had been in charge of its accounting department for about thirteen years, was called as a witness by petitionee, and after testifying in detail to the amount of business, both passenger and freight, done at the Royalton station in 1925, and to the proposed change in service at that point, and that the purpose of such change was to save money, was asked on cross-examination:

"Q. Couldn't you save money by putting a caretaker in at Randolph and let him handle the $4,800 express and do the accounting at Bethel?"

This was objected to and excluded, subject to petitioners' exception. This was not proper cross-examination, since the inquiry related to a matter wholly collateral to any issue before the Commission. That a saving could be made at some other station by a change similar to that proposed had no bearing whatever on the question of whether such change was justified in the instant case. A question somewhat similar in principle was before the court in State v. Dropolski (Vt.) 136 Atl. 835;

McGovern v. Smith, 73 Vt. 52, 50 Atl. 549, and Clark v. Smith, 72 Vt. 138, 47 Atl. 391, and it was held in each instance that the evidence was incompetent.

[10] The same witness was permitted to testify, subject to the objection that it did not appear that he was qualified to give evidence concerning the subject-matter, that "carload shippers" would not be inconvenienced at all by the proposed change in service, and to state the reasons why. Whether admissible or not, this evidence was rendered harmless by the witness later testifying, without objection, to substantially the same thing. Murray v. Nelson, 97 Vt. 101, 108, 122 Atl. 519, and cases there collected.

[11] The same witness testified in direct examination that he had made a special study of the revenues, expenses, and general financial conditions at the Royalton station, and had prepared a report showing the amount of business done there, the number of shipments, and the financial condition of the petitionee, whereupon such report was offered in evidence for use "in connection with the witness' testimony on these various subjects, and to prove the matters therein recited," and was admitted subject to the following objection:

"I object to the offer of this report if it is going to be used in connection with the witness' testimony. The testimony must come before the Commission as testimony, as such, and not simply a report."

Counsel are not agreed as to the scope of this objection. Petitionee claims that it merely raises the question of the admissibility of the report for use in connection with the witness' testimony, while petitioners insist that it also raises the question of its admissibility as independent evidence. Whichever is right about this, the first two pages of the report, which are the only part thereof to which petitioners call attention as being prejudicial to them, were clearly inadmissible. But since the substance of what there appears, which in the main is an explanation of the attached schedules and the reasons for the proposed change in service, was testified to by the witness, without objection, and was undisputed, it is not apparent how the petitioners were harmed by its admission. Its admission was error, but harmless

so far as any ground now urged against it is concerned. Woodhouse v. Woodhouse, 99 Vt. 91, 130 Atl. 758.

[12] The petitioners saved exceptions to certain of the findings, which they now rely upon. Whether these require consideration depends upon whether the unchallenged findings are sufficient to support the judgment of the Commission, since if they are it will be affirmed, unless a reversal is required for other reasons. International Products Co. v. Estate of Vail, 97 Vt. 318, 123 Atl. 194. See also, Hall v. Windsor Sav. Bank, 97 Vt. 125, 121 Atl.582, 124 Atl. 593; McClary v. Hubbard, 97 Vt. 222, 122 Atl. 469; Platt v. Shields & Conant, 96 Vt. 257, 119 Atl. 520.

It appears from the unchallenged findings that the petitionee operated at a loss, for the years 1924 and 1925, of $897,062.51 and $822,755.29, respectively; that the purpose of the proposed change is to save the difference in salary between an agent and a caretaker, which is $1,380; that under the proposed change the accounting and clerical work now done at this station will be done by the agent at South Royalton, which is only two miles from this station; that a caretaker will be in charge of the passenger station, and keep it open, warm, and clean; that he will have charge of the freight house, and handle the express if he is approved by the express company; that the same number of trains, both passenger and freight, will stop at this station as stop at the present time; that the only change in passenger service will be that tickets will have to be purchased and baggage checked on the train; that petitionee will continue to load and unload freight at this station side track, and will handle incoming and outgoing shipments in less than carload lots; that forwarding orders on outgoing freight can be mailed or delivered to the agent at South Royalton, who will issue bills of lading and give them to the conductor, who will check up the freight and receipt for the same and mail such bills to the consignor or leave them for him with the caretaker; that incoming freight in carload lots will be set out here, and less than carload lots will be unloaded by the trainmen into the freight house, after which the same will be at the risk of the consignee. It furthers appears that compared with other stations of petitionee having agency

service, the total freight and passenger business of this station is exceedingly small; that for the year preceding the hearing the total amount of freight received and forwarded here was 1,692 tons, made up of 1,134 shipments received and 267 shipments forwarded; that during that time the carload shipments received averaged one in ten days and like shipments forwarded averaged the same; that less than carload shipments received averaged three per day, and like shipments forwarded averaged three in five days; that the total number of tickets sold was 844. It is also found that the proposed change will undoubtedly inconvenience people using this station as a shipping and receiving point of freight; that the most serious result attending the change will be the fact that less than carloads lots of freight left at the station for shipment will be at the shipper's instead of the carrier's risk until loaded onto the cars, and incoming freight in less than carload lots will be at the consignee's instead of the carrier's risk after delivered at the station. The findings close with these words:

"On all the evidence presented we are of the opinion that the petitionee, the Central Vermont Railway Company, is warranted in discontinuing the service of its agent at the Royalton station and in substituting therefor the services of a caretaker."

Other findings aside, we think those recited sufficient to sustain the order of the Commission.

[13, 14] The kind of service which the patrons of this or any other station are entitled to receive does not depend alone upon the convenience of such patrons, or the fact that such station is self-supporting financially, as is claimed to be the fact in the instant case, although these, of course, are important factors for consideration. But of equal importance in determining this question is the volume of business done at such station, its proximity to other stations, the accessibility of the latter, the cost of furnishing such service, etc. With due regard for the inconvenience to which the patrons of this station will be subjected by the proposed change, we think the situation as a whole, as presented by the unchallenged findings, justifies the result reached by the Commission. In arriving at this conclusion, we are not unmindful of the fact that petitionee is a

public service corporation, and that as such it is subject to certain common-law and statutory regulations and limitations in the conduct of its business; but we are not aware of any requirement, either common-law or statutory, that is violated by the proposed change, in view of the circumstances presented. State v. Central Vermont R. Co. 81 Vt. 463, 71 Atl. 194, 130 Am. St. Rep. 1065, and cases there collected, although dealing with the subject of rates, are instructive as to the scope and meaning of the provision of G. L. 5231, respecting reasonable and equal benefits, facilities, and accommodations for transportation, etc. In State v. Central Vermont R. Co. *supra,* it is said that this statute must be construed so as to give effect to the word "reasonable" as well as to the word "equal," if possible. In McDuffee v. Portland & Rochester R. Co. 52 N. H. 430, 13 Am. Rep. 72, 77, where a statute essentially like ours was under consideration, it is said:

"The common and equal right is to reasonable transportation service for a reasonable compensation. Neither the service nor the price is necessarily unreasonable because it is unequal, in a certain narrow, strict, and literal sense; but that is not a reasonable service, or a reasonable price, which is unreasonably unequal."

In Concord & Portsmouth R. Co. v. Forsaith, 59 N. H. 122, 47 Am. Rep. 181, it is said concerning the same statute:

"Taken together, it is plain that no arbitrary rule of absolute equality, but one of reasonable and just equality, was intended."

We entertained no doubt that such is the meaning of the equality provision of G. L. 5231, that the equality here contemplated is a reasonable and just, rather than an absolute, equality. Obviously what would be reasonable and just facilities and accommodations for places doing an exceedingly small amount of business might not, and probably would not, be for places doing a large volume of business; and it is not reasonable to suppose that the legislature intended that places of the former class should have precisely the same kind of facilities, etc., furnished places of the latter class. We think the statute means no more than that each class shall be furnished such facilities and accommodations as the amount and character of its business

reasonably and justly demand. This constitutes reasonable equality, within the meaning of the statute. Any other construction would result in unreasonable inequality.

What has been said respecting G. L. 5231, is equally applicable to the provisions of G. L. 5050, subdivision IX.

Although unnecessary to do so since the findings not excepted to sustain the order, we will notice two exceptions to the findings which petitioners appear to regard of unusual importance.

An exception was saved to the statement in the findings that it was impossible to find from the evidence whether or not this agency was self-supporting on its own revenues, on the ground that the evidence fairly and reasonably tended to show that it was self-supporting. Suffice it to say that the affirmative evidence on this issue is not so convincing that this statement can be said to be unwarranted. Furthermore, such a finding, had it been made, would not change the result, in view of the other findings.

[**15**] The petitioners excepted to the statement in the findings that, in the opinion of the Commission, the curtailment of petitionee's liability as bailee of less than car lots of freight did not amount to a substantial reduction of accommodations furnished, etc., within the purview of G. L. 5215, as being impertinent to any issue in the case. The only fault now found with this statement is that, in effect it amounts to a holding by the Commission that, inasmuch as the curtailment of petitionee's liability as bailee did not infringe the requirements of G. L. 5215, that circumstance ceased to be of consequence, and, therefore, that it was not given the importance to which it was entitled. Such conclusion is not justified. The assumption is that the Commission made proper use of the evidence before it for all legitimate purposes, and this mere statement does not warrant an inference to the contrary.

[**16**] Petitioners saved some exceptions to the failure of the Commission to make certain findings, but since the record fails to show any requests for findings, such exceptions are overruled. Gray v. Brattleboro Trust Co. 97 Vt. 270, 274, 122 Atl. 670.

Order affirmed. Let the result be certified to the Public Service Commission.

P.U.R.1928A.

COLORADO PUBLIC UTILITIES COMMISSION.

RE BUS TRANSPORTATION COMPANY.

[Application No. 737.]

RE FITZSIMONS BUS & TAXI COMPANY.

[Application No. 762.]

(Decision No. 1339.)

Certificates of convenience and necessity — Choice of applicants — Motor bus operators — Possession of permit.

A certificate of public convenience and necessity should be granted to the one of two applicants who possesses a permit or authorization from the Secretary of War to transport passengers for hire in and upon the grounds of a hospital under the jurisdiction of the War Department, rather than to the applicant who does not possess such authority, when the contemplated service which is found to be necessary is to be conducted in and around the hospital grounds and to a designated city.

[June 24, 1927.]

APPLICATIONS for certificates of public convenience and necessity; application granted in one case and denied in the other.

Appearances: W. A. Alexander, Denver, for applicant in No. 737; B. C. Hilliard, Jr., Denver, for applicant in No. 762.

By the **Commission:** On June 26, 1926, the Bus Transportation Company, a Colorado corporation, filed its application with this Commission for a certificate authorizing the operation of a motor vehicle transportation system for the transportation of passengers between the town of Aurora, Colorado, and Fitzsimons general hospital, including therein operations in and upon the grounds of Fitzsimons General Hospital. On February 15, 1927, an amended application was filed.

On July 21, 1926, the Fitzsimons Bus & Taxi Company, a Colorado corporation, filed its application with this Commission for a certificate authorizing the operation of a motor vehicle transportation system for the transportation of passengers between Fitzsimons General Hospital and Denver, via Aurora.

Protest was filed by the Fitzsimons Bus & Taxi Company against the application of the Bus Transportation Company,

and the Bus Transportation Company filed a protest against the application of the Fitzsimons Bus & Taxi Company. The Denver Tramway Corporation also filed a protest against the application of the Fitzsimons Bus & Taxi Company.

These applications were set down for public hearing at the hearing room of the Commission, State Office Building, Denver, Colorado, on February 23, 1927, at 10 o'clock A. M. By stipulation both applications were consolidated for hearing.

Because of the conclusions reached by the Commission it will not be necessary to review all the questions raised in the applications and in the briefs. The testimony in support of the application of the Fitzsimons Bus & Taxi Company was to the effect that it has been operating from the Fitzsimons General Hospital grounds for some time; that a permit was granted to L. C. Conner by the Secretary of War to transport passengers for hire in and upon the grounds of the Fitzsimons General Hospital, in the county of Adams and state of Colorado, and that said Conner organized the Fitzsimons Bus & Taxi Company and is operating under said permit; that said Conner has been engaged in the business of transporting passengers over the route in question for seven years, and has used busses thereon since 1922. The testimony further shows that the service offered by the Fitzsimons Bus & Taxicab Company has been satisfactory in every respect. It was stipulated by the parties hereto that a public convenience and necessity does exist for such an operation as proposed.

The investment of the Fitzsimons Bus & Taxi Company in this operation is approximately $26,000.

Until the decision in the case of Greeley Transp. Co. v. People, 79 Colo. 307, P.U.R.1926D, 433, 245 Pac. 720, it was assumed by the Commission that it had no jurisdiction over such an operation as is involved herein, hence there is some justification for the Fitzsimons Bus & Taxi Company operating for so long a time without applying to this Commission for a certificate.

In our opinion the main question, however, in these applications, is as to which one of them have the required authority provided under § 35 (c) of the Public Utilities Act. This section provides, *inter alia,* that "every applicant for a certificate

shall file . . . evidence . . . to show that such applicant has received the required consent . . . permit . . . or other authority of the proper . . . public authority." These applications contemplate operating from the grounds of the Fitzsimons General Hospital in Adams county, Colorado. The evidence is clear that only such operator as receives a permit or authorization from the Secretary of War to transport passengers for hire in and upon the grounds of Fitzsimons General Hospital will be permitted to operate thereon. The Fitzsimons Bus & Taxi Company has this authority. The Bus Transportation Company has not. The Commission purposely gave an extension of time to the Bus Transportation Company to supply such authority if it could be obtained. No such evidence of securing such authority has been submitted to the Commission. Nothing remains for the Commission to do, therefore, except to deny the certificate of the Bus Transportation Company, and grant a certificate to the Fitzsimons Bus & Taxi Company.

The Commission, after a careful consideration of all the evidence introduced herein, is of the opinion, and so finds, that the present and future public convenience and necessity requires and will require the operation of the Fitzsimons Bus & Taxi Company to operate a motor vehicle carrier system for the transportation of passengers between Fitzsimons General Hospital, in Adams county, Colorado, to the city and county of Denver, via Aurora.

ORDER.

It is therefore *ordered,* that the application of the Bus Transportation Company be and the same is hereby denied.

It is *further ordered,* that the present and future public convenience and necessity requires, and will require, the motor vehicle transportation system for the transportation of passengers by the Fitzsimons Bus & Taxi Company, a corporation, between Fitzsimons General Hospital, in the county of Adams and state of Colorado, and the city and county of Denver, via Aurora, and this shall be deemed and held to be a certificate of public convenience and necessity therefor, subject to the following conditions:

That the applicant shall file tariffs of rates, rules and regulations, and time schedules as required by the rules and regulations of this Commission governing motor vehicle carriers within a period not to exceed twenty days from the date hereof.

It is *further ordered,* that the applicant shall operate such motor vehicle carrier system according to the schedules filed with this Commission, except when prevented from so doing by the Act of God, the public enemy or unusual and extreme weather conditions, and this order is made subject to compliance by the applicant with the rules and regulations now in force or to be hereafter adopted by the Commission with respect to motor vehicle carriers, and also subject to any future legislative action that may be taken with respect thereto.

COLORADO PUBLIC UTILITIES COMMISSION.

RE PARADOX LAND & TRANSPORT COMPANY.

[Application No. 789; Decision No. 1399.]

Certificate of convenience and necessity — Jurisdiction of Commission concerning interstate commerce.

While a State Commission has no right to deny a certificate of public convenience to a carrier engaged exclusively in interstate commerce, in the event such carrier is willing to comply with all other provisions of the state law governing motor vehicles it has jurisdiction to grant such a certificate without a showing of public convenience and necessity.

[August 12, 1927.]

APPLICATION for certificate of public convenience and necessity; application granted.

Appearances: George H. Swerer, Denver, for applicant; Thomas R. Woodrow, Esq., Denver, for the Denver & Rio Grande Western Railroad Company, and the Denver-Colorado Springs-Pueblo Motor Way, Inc.; J. Q. Dier, Denver, for the Colorado & Southern Railway Company; Erl H. Ellis, Denver, Colorado, for the Atchison, Topeka & Santa Fe Railway Company.

By the **Commission:** On September 29, 1926, the Paradox Land & Transport Company filed its application with this Commission for a certificate of public convenience and necessity authorizing it to operate a motor vehicle system for the transportation of passengers and light express between Denver, Colorado, Raton, New Mexico, and Amarillo, Texas. It is alleged in the application that the transportation business as carried on by the applicant is strictly an interstate business in so far as the state of Colorado is concerned, and that the applicant is ready and willing to comply with all regulations of the state of Colorado, through this Commission, concerning public automobile carriers.

On November 9, 1926, the Denver-Colorado Springs-Pueblo Motor Way, Inc. and the Denver & Rio Grande Western Railroad Company filed a motion to dismiss this application on the ground that this Commission has no jurisdiction to issue to the applicant a certificate of public convenience and necessity for a motor bus transportation system in interstate commerce. This motion was adopted by the Colorado & Southern Railway Company and the Atchison, Topeka & Santa Fe Railway Company and was set down for argument on December 17, 1926.

Section 35 of the Public Utilities Act provides as follows:

"No public utility shall henceforth begin the construction of a new facility, plant, or system . . . without first having obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such construction. . . ."

Section 3 of the Public Utilities Act provides that, "the term 'public utility' when used in this act includes every common carrier. . . ."

Section 2 (e) of the Public Utilities Act provides that, "the term 'common carrier' when used in this act includes every . . . corporation or person affording a means of transportation by automobile or other vehicle whatever . . . by indiscriminately accepting, discharging, and laying down either passengers, freight, or express between fixed points or over established routes. . . ."

Section 1 (d) of House Bill 430, effective July 30, 1927, de-

this case, he must bring himself within it. He must make an application for a certificate as a bus operator. . . . Not having done that, he should have been enjoined from engaging in every form of transportation along this route. . . ." Other cases holding substantially in the same manner are as follows:

Cannon Ball Transp. Co. v. Public Utilities Commission, 113 Ohio St. 565, P.U.R.1926C, 564, 149 N. E. 713; Re Schappi Bus Line (Ind.) P.U.R.1925E, 525; Newport Electric Corp. v. Oakley, 47 R. I. 19, P.U.R.1925E, 475, 129 Atl. 613; Re Arizona Pacific Transit Co. (Ariz.) P.U.R.1924C, 501.

Our supreme court has never directly passed upon this question.

The Commission, therefore, is of the opinion that while it has no right to deny a certificate of public convenience and necessity to a carrier engaged exclusively in interstate commerce, in the event such carrier is willing to comply with all other provisions of the Public Utilities Act it has jurisdiction to grant such a certificate, without a showing of public convenience and necessity, providing the carrier will comply with all other provisions of the laws of this state governing common carriers.

Note.—Certificates of convenience and necessity.

I. When required, 652.
II. Evidence of convenience and necessity, 653.
III. Grounds for refusing, 654.
IV. Operation prior to statute, 655.
V. Preference between applicants, 656.
VI. Extension of term of certificates, 656.
VII. Restrictions and conditions, 656.
VIII. Sale of certificate, 656.
IX. Revocation, 657.
X. Procedure, 657.

I. When required.

In Griffon v. Villia, Order No. 472, No. 808, Nov. 14, 1927, the holder of a certificate of convenience authorizing him to engage as a public carrier by bus between certain points in a parish complained that the defendant was engaging in the transportation of passengers by bus over the same route without a certificate. The Louisiana Com-

mission, in dismissing the proceeding, reviewed the facts as follows: "It appears from the testimony that the defendant is engaged in the transportation of school children from their homes to school and return, under a contract for private carriage, and that he likewise carries a number of workmen to and from their places of employment along the route operated over by the complainant. This service also is furnished under an arrangement by which these passengers agree to pay Villia a stipulated sum per week. It does not appear that the defendant has knowingly infringed upon the rights granted the complainant in the certificate issued to him and he has stated that he will in the future confine himself strictly to the carriage of those persons with whom he has private contracts."

II. Evidence of convenience and necessity.

In Re United Stages, Decision No. 18689, Application Nos. 11518, 11784, Aug. 8, 1927, the California Commission decided that public need along a proposed through bus route was ample enough to permit unlimited through service co-existent with established local service. The Commission said: "The larger question of convenience to the public in providing direct and rapid through transportation to distant points outweighs the objections made by this protestant to the establishment of through service by applicant, the public, we believe, being entitled to a choice of services when the demand is large enough, as appears to be the case from the record in this proceeding."

In ibid. the Commission said: "The right of Pickwick Stages to use this route as it has been used was questioned in the proceeding, but the operation was excused on the ground that the work being done on the route via Moreno, commonly known as the 'Jack Rabbit Trail,' was such that it was unsafe to operate the large passenger vehicles of applicant over this route. The testimony was not clear that this was a good reason at all times, but it appeared that frequently the detours provided were such that safe stage operation could not have been conducted over them. However, it appears that it is to the public interest to have one branch of the Pickwick Stages System to the Imperial Valley pass over this route for through service purposes, and as no important objection was made in the hearing to such through service, we believe a certificate should be granted authorizing this applicant to route its stages to Imperial Valley either via Moreno or via Loma Linda east of Riverside."

In Re Elgin, B. & Rockford R. Co. No. 17357, Sept. 21, 1927, the Illinois Commission allowed a certificate to the petitioning electric interurban railway company to supplement its electric car service by operating busses over highways approximately parallel to its tracks and alternating the running time of each. The Commission said that

the evidence showed: "That the population along said hard surface highways is materially increasing and thereby creating a corresponding demand and necessity for a closer and more frequent transportation service. That this service cannot be rendered by any existing railway except through an auxiliary bus service operated in conjunction therewith. That the transportation now furnished the residents along said highways and in the communities not located convenient to existing railways, is inadequate for the necessary convenience of the people residing in said territory and that the operation of the proposed bus service would be frequent, convenient and of material benefit to the respective communities thereby served."

In Re Glacier National Park Transport Co. Docket No. 984, Report & Order No. 1494, Oct. 6, 1927, the Montana Commission refused the application of a motor utility (The Midland Transportation Company) for a certificate of convenience to operate over a route of great length, and doubtful patronage with poor roads and possibly impassable winter conditions. Evidence showed that a former company had failed in the same enterprise, that the facilities for the undertaking were hardly adequate and the hope of success depended upon increased future patronage which was highly speculative. The Commission commented upon the situation as follows: "The reason for the failure is attributed largely to the fact that any demand for this service would naturally come from people touring the west via railroad facilities whose routeings are generally made up by tourist bureaus and ticket agencies, and are limited in point of time. Before leaving their homes these tourists have their Pullman accommodations for the entire trip arranged for and it is asserted that rarely, if ever, will a tourist sacrifice his Pullman accommodation in order to vary his trip. It further appears from the evidence that such public demand, as now exists for inter-park transportation is the result of intensive promotion on the part of the railroads serving these parks."

In Re Mound City & Eastern R. Co. I. C. C. Finance Docket No. 6424, S. D. R. C. Docket F–1118, Oct. 11, 1927, the South Dakota Board of Railroad Commissioners granted a certificate of convenience and necessity for the construction and operation of a railroad for the transportation of passengers and freight upon showing the proposed route was 50 miles long and not parallel to any existing line within statutory restrictions, and further that the territory was well developed, and adequate return could reasonably be expected from the shipments of various rural products.

III. Grounds for refusing.

In Re Hall, Application No. 657, Decision No. 1449, Oct. 13, 1927, P.U.R.1928A.

the Colorado Commission, in refusing the applicant a certificate of convenience and necessity, made the following statement: "It developed further that there was in existence at the time of the hearing and had been for sometime prior thereto (how long was not made clear) a contract between the applicant and Stodgill by which if and when a certificate is granted herein, the same shall be assigned to Stodgill. The applicant referred to the operations by both himself and Stodgill as 'his line.' Just why the operations of the two of them should be called 'his line,' is not clear. The Commission doubts seriously the propriety of granting a certificate to an applicant who is seeking the same with the intention and with the sole purpose of transferring it to another. We make this statement merely in passing as we must deny the certificate on another ground that it has repeatedly taken."

The Pennsylvania Commission, in Re Philadelphia Rural Transit Co. Application Docket Nos. 8527, 16970–16972, Oct. 31, 1927, refused to grant a certificate of convenience and necessity for the inauguration of a bus line for connection with a city subway under construction in advance of the operation of the subway. The Commission stated: "Inasmuch as the Broad street subway will probably not be in operation for some months to come, the Commission sees no present necessity for acting upon the Rural Transit Company's application for Route 'V'. Accordingly this application will be withheld for disposition until the completion of the subway and arrangements for its operation."

IV. Operation prior to statute.

In Re Schwilke, Application No. 631, Decision No. 1448, Oct. 13, 1927, the Colorado Commission refused a certificate to an applicant to operate a motor carrier route who had been engaged in such enterprise since 1906 with the unfortunate exception of two years during which he was obliged to suspend operation because of circumstances beyond his control. The Commission regretted the need for denying an applicant proven so able financially and otherwise to operate but pointed out the requirement by law for proof of public necessity by applicant not in business continuously since prior to the regulatory act. The Commission further stated: "We might add that there are quite a number of burdens carried by those operating at the present time under certificate from this Commission. Among these are the requirements that they pay a tax based on the ton miles and carry substantial insurance. The Commission almost daily has called to its attention cases in which certificate holders, who in every respect are complying with the law designed to protect the public, are unable to operate at a reasonable profit, if any profit at all, because of un-

lawful motor vehicle operation in a field where there is not enough business to justify duplication."

V. Preference between applicants.

In Re Isaacson, No. 4 A, Sept. 15, 1927, the Wisconsin Commission granted a certificate of convenience and necessity to the applicant to operate as an auto transportation utility. The Commission made the following statement: "The only objector was a competing line, the Yellow Cab & Transit Company which has been operating over substantially the same route as applied for by the applicant since 1919, but which has never had such operation authorized by the Railroad Commission. Legally, the applicant is the only one applying for a certificate and there can be no question but that there is a demand for public service along the route sought to be operated by the applicant."

VI. Extension of term of certificates.

The Arizona Commission, in Re Union Auto Transp. Co. Docket No. 1650-A-634, Decision No. 4216, Oct 31, 1927, approved the extension of the life of a certificate to a motor bus utility for a period of ten years to stabilize the company and strengthen its credit and place the period of its expiration co-terminus with that of a rival utility in similar circumstances then in effect.

VII. Restrictions and conditions.

In Re Philadelphia Rural Transit Co. Application Docket Nos. 8527, 16970–16972, Oct. 31, 1927, a protestant holder of a certificate complained of the insertion of a stipulation incorporated in his certificate because of the fact that neither he nor his attorney had formerly consented to the insertion of the same at the time of his acceptance. The Pennsylvania Commission refused to conceive this claim, stating: "Stipulations, conditions, and restrictions in certificates of public convenience are inserted by the Commission not by grace or consent of certificate holders, but for reasons which in the Commission's judgment make them necessary or advisable in the public interest."

VIII. Sale of certificate.

In Re Crawford & Son, No. 780-M, Aug. 23, 1927, the Indiana Commission approved the sale of a certificate of convenience by a former bus operator, all of whose equipment was destroyed by fire, and who had no means of rehabilitating the service, to an established motor utility operating in nearby territory for the sum of $1 and other considerations. The Commission entered also an order requiring insurance to be taken out by the purchasing utility against damage done to property or persons through the operation of the busses.
P.U.R.1928A.

IX. Revocation.

A certificate of convenience and necessity to operate an interstate bus line was revoked and cancelled by the Rhode Island Commission in Re Inter-City Coach Co. Application No. 746, Order No. 1172, Aug. 29, 1927, because of the failure of the applicant to file the necessary bond and registration within sixty days after receiving the certificate.

X. Procedure.

In Re Glacier National Park Transport Co. Docket No. 984, Report & Order No. 1494, Oct. 6, 1927, the Montana Commission refused the application of a motor carrier, the Yellow Cab & Baggage Company, for a certificate of convenience and necessity upon its failure to appear after notice at a hearing upon the objection of a railroad and an express carrier already operating in the territory proposed. The Commission stated: "The Commission does not feel that it is called upon to pass upon the merits of the protest as the applicant, although duly notified, failed to appear or be represented at the hearing and offer any evidence in support of its application. It is recognized as fundamental that the burden of showing that public convenience and necessity requiring a proposed service rests upon the applicant for a certificate authorizing the service and that in the absence of such a showing the Commission is without power to grant its certificate (Re Towns (Va.) P.U.R.1925B, 379). Such certificate cannot be granted solely upon the ground that the applicant desires to establish a service in competition with existing carriers (Re Peters (Cal.) P.U.R.1925D, 736)."

COLORADO PUBLIC UTILITIES COMMISSION.

RE RULE 18 REGULATING HEATING VALUE OF GAS.

[Case No. 84; Decision No. 1434.]

Rates — Gas — B.T.U. proportions to volume.

1. Trustworthy evidence establishing the fact that a decrease or increase of B.T.U. content is followed by an increase or decrease in consumption, a gas rate rule was changed so that whenever the B.T.U. content of gas should be reduced, the rate schedule for gas should be also reduced in direct proportion, p. 658.

Service — Schedule on file — Gas standard — B.T.U. content.

2. Each utility supplying gas was ordered to establish and maintain for its product a standard heating value of the total monthly aver-

age of gas delivery within one mile of the central point of distribution and expressed in B.T.U. per cubic foot as a part of its schedule of rates on file with the Commission, p. 659.

[October 8, 1927.]

SUPPLEMENTAL order changing gas rate rule upon findings of Commission upon its own investigation.

By the **Commission:** On July 16, 1927, this Commission entered an order instituting an investigation of the necessity and propriety of revising Amended Rule No. 18 regulating the heating value of gas wherein it may in any way be found unreasonable, unfair, unjust, incomplete, inadequate, equivocal, or misleading and providing that said investigation shall include the question of the effect of the lowering of the B.T.U. content upon the volume of gas consumed. Notice of the hearing was immediately given to all utilities.

A hearing on this matter was held in the hearing room of the Commission, Denver, Colorado, September 20, 1927, at which time evidence relating to the heating value of gas and the effect of lowering or raising the B.T.U. content upon the volume consumed by the customers was introduced.

[1] Mr. E. R. Weaver, chemist of the Bureau of Standards, Washington, D. C., testified at length on this matter. He has been connected with the bureau in this work for the past fifteen years and in the past four or five years has devoted most of his time to gas problems of public utilities throughout the United States. His investigations have been most extensive and thorough and the Commission was very much impressed with his testimony, especially as it relates to the changing of the B.T.U. content per cubic foot to the consumer without any change in the charge to the consumer. According to his contention, ably supported by his testimony, the results of all tests throughout the country, made or checked by the bureau, show without exception and the Commission so finds that with the proper adjustment of appliances and devices a decrease or increase of the B.T.U. content is followed by an increased or decreased consumption of gas in direct proportion to such decrease or increase. All the other testimony, being that of representatives of Greeley Gas

& Fuel Company, Otero County Gas Company and Trinidad Electric Transmission Railway & Gas Company, was to the same effect. Mr. Weaver proposed certain changes in Rule No. 18, the most important one of which is that whenever the B.T.U. content of gas shall be reduced that the rate schedule for gas shall be also reduced in direct proportion.

After a careful consideration of this entire matter, the Commission has formulated a new rule to be designated as "Revised Rule No. 18."

ORDER.

It is therefore *ordered,* that the following "Revised Rule No. 18" regulating the heating value of gas is hereby declared to be reasonable and shall be observed and followed by all gas utilities either owned or operated within the jurisdiction of this Commission.

Amended Rule No. 18

Heating Value of Gas

[2] Each utility supplying gas for domestic or commercial purposes shall establish and maintain a standard heating value for its product, which standard shall be the monthly average total heating value of the gas as delivered to consumers at any point within one mile of the manufacturing plant or center of distribution. The utility shall declare this standard expressed in B.T.U. per cubic foot as a part of its schedule of rates on file with the Commission.

This standard heating value shall be that value which is on file with the Commission as a part of the utility's schedule of rates on the effective date of this Revised Rule No. 18, or that value which shall be declared by the utility, provided, however, that any change in value shall be made in accordance with the conditions hereinafter stated.

If the utility finds it more practical, economical, and efficient to render service with gas of another heating value than the standard heating value on file with the Commission, the utility may file a new heating value standard and a new rate schedule; and if the conditions hereinafter stated shall have been com-

plied with and the Commission shall not have suspended the new rate schedule as provided in Section 48 of the Public Utilities Act (C. L. 1921, § 2957) or ruled against the change, such new heating value standard and rate schedule shall become effective thirty days from the date on which they are filed with the Commission. The conditions which must be met by a utility thus voluntarily changing its heating value standard are as follows:

(1) The rate schedule for gas shall be so changed that every part or kind of charge in the rate shall be reduced and may be increased in direct proportion to the reduction or increase of the B.T.U. content, except that the minimum charge, service charge, or customer charge shall remain unchanged.

(2) Readjustment of customers' appliances and devices to render unimpaired service under the new standard shall be promptly made by the utility without charge to the customers.

(3) The utility shall be prepared to justify the standard it adopts before the Commission by such pertinent facts as may be required.

The utility shall maintain the heating value of the gas with as little deviation as is practicable and such deviation is limited to the range of 5 per cent above to 5 per cent below the standard adopted.

To obtain the monthly average heating value of gas, the results of *all* tests of heating value made on any day shall be averaged, giving the average total heating value for that day. The monthly average total heating value shall be the average of all such daily averages taken during the calendar month. It is understood that all records and statements are based on tests made under standard conditions, i. e., at 60 degrees Fahrenheit and under a pressure of 30 inches of mercury.

It is *further ordered,* that the present Revised Rule No. 18 shall be stricken from the rules regulating the service of gas, electrical, and water utilities effective October 10, 1927.

It is *further ordered,* that said "Revised Rule No. 18" shall take effect on the 10th day of October, 1927, and shall continue in force until suspended, modified, or set aside by this Commission.

P.U.R.1928A.

ILLINOIS COMMERCE COMMISSION.

S. LESTER DALY, Mayor of the City of Metropolis

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

[No. 16327.]

Service — Railroads — Through passenger service — Adequate return as a whole.

1. Through and separate passenger service should be established in territory where public convenience, industrial, and community growth, and the unsafe, circuitous, and broken up condition of existing routeings call for more expeditious, direct and regular service between appropriate centers, and where revenues from the system as a whole in that territory amply warrant the inauguration of such service, p. 664.

Service — Railroads — Through train service — Statewide connections — Return.

2. Through train service should be established between strategic points where through mutual connection to all parts of a state would thereby be affected, giving stations along such route access to practically every line in the state and affording opportunities to patrons of these lines to travel out of the state in all directions with greatest convenience of connection and where the revenue from traffic in the territory as a whole amply warrants such service, p. 666.

Apportionment — Railroads — Revenues between stations — Unexplained changes.

3. The matter of apportioning revenues is very largely arbitrary and there is no reason to assume that figures, first introduced by a utility witness, were not just as accurate as those subsequently adduced without apparent cause for the change, p. 666.

Service — Railroads — Separate freight and passenger trains — Charter duty.

4. It is the duty of every railroad to operate a separate service for passengers and freight, and the operation of a freight train with passenger accommodations in a caboose, or else wholly by mixed trains, is inadequate to meet public conveniences and is not a compliance with the charter duty of the carrier, p. 667.

[October 5, 1927.]

COMPLAINT against interrupted and inconvenient passenger train service between certain cities; through and separate passenger and freight train movements ordered.

By the **Commission**: This is a complaint by S. Lester Daly,

mayor of the city of Metropolis, county of Massac, and state of Illinois, as the representative of the public of said city brought against the respondent, Chicago, Burlington & Quincy Railroad Company of the train service between the city of Metropolis and the city of Bushnell on the rails of the respondent. It is alleged that between the city of Herrin and the city of Metropolis there is no passenger train service; that between Herrin and Bushnell the service is broken up into short divisions which are not operated to connect with each other so that the road cannot be used for through service. The prayer of the complaint is that the Commission shall make an investigation and require the respondent to operate a separate passenger train service from the city of Metropolis through to the city of Bushnell either by a continuous trip or by such connections as will give a through service without unnecessary wait or intermission between trains in making the trip from Metropolis to Bushnell or vice versa. It is alleged that the Burlington Railroad is one of the principal railway systems of the state of Illinois, and that its lines extend far into the West, and that the extensive system has connections with other railways which are needed by the traveling public from its line which extends from Galesburg and Bushnell to Metropolis and Paducah; that the branch which extends from Bushnell to Metropolis was completed to Metropolis many years ago (more than twelve years), and that a passenger service has never been operated on said railway between Metropolis and Herrin; that from said city of Bushnell to Metropolis said railway passes southeasterly through the counties of McDonough, Fulton, Cass, Morgan, Sangamon, Macoupin, Montgomery, Bond, and Clinton to Centralia in Marion county, and thence from Centralia southward through the counties of Marion, Jefferson, Franklin, Williamson, Johnson, and Massac to Metropolis, and thence to Paducah, Kentucky, the southeastern terminus of said line; that from Paducah a large number of railway systems branch to the south and southeast; that at Bushnell there is a connection of said railway with the entire Burlington System which extends to the Pacific coast; that from the southeastern portion of the state the method of reaching the northwest and central portions of the state is an indirect and

circuitous route over various railways and connections, and if through passenger service was operated over this line, the Chicago, Burlington & Quincy, an outlet would be given to and from the southeastern part of the state to and from the various cities of central, western, and northwestern portions of the state of Illinois, and thence both west and east through the connections of the Burlington to the entire country; that the Burlington Railway System is one of the large systems of the country and derives a large net revenue from the traffic carried over its rails; that the line from Bushnell to Herrin is one of the best revenue producing lines of the entire system, not excepting its main lines from Chicago to Burlington and Quincy. The complaint was filed on the 10th of May, 1926. The first hearing was held at the city of Metropolis before assistant Commissioner, George W. Piller, on December 14, 1926. Three other hearings were held, one at Springfield, a second at Metropolis, and on the 21st of June, 1927, the final hearing was held in Springfield, the hearings then concluded and the cause submitted to the Commission on written briefs. A brief was filed by the complainant, or petitioner, an answer thereto by the respondent and a reply brief subsequently filed in accordance with the order of the assistant commissioner at the time the cause was taken for consideration. The Commission has given this cause full consideration both upon the evidence and the briefs of counsel filed for the respective parties and therefrom finds the following facts:

(1) That the Chicago, Burlington & Quincy Railroad System is one of the largest systems of railways in the state of Illinois; that it has lines radiating from the city of Chicago northwesterly to the city of Minneapolis, Minnesota southwest through the city of Galesburg to Burlington, Iowa, and thence West to Council Bluffs and Billings, Montana, with a main line branching from Lincoln, Nebraska to Denver, Colorado, and a line extending from Galesburg southwest in the state of Illinois to the city of Quincy, thence west to Kansas City, Missouri, and connecting with the Chicago-Denver line at the city of Oxford, Nebraska, thence to Denver, Colorado; that said system is operated in connection with the Great Northern and Northern Pa-

cific to the Pacific coast; that it also has a line extending from Galesburg to Yates City, thence to Peoria with a further extension from Yates City south to East St. Louis, and a branch line extending from Concord Junction southeast to Shattuck, Centralia, Herrin, and Metropolis; and, also a line between Shattuck and East St. Louis, Illinois; that in Illinois, there are numerous other lines of said system which serve as feeders and connecting lines.

[1] (2) That the line between Galesburg and Peoria and East St. Louis is one of the principal passenger lines of respondent's system and is operated regularly with separate passenger service; that the line between Galesburg and Peoria has scheduled three through passenger trains each way daily and at Galesburg, which is a central Burlington point in Illinois, connects with a large number of Burlington lines extending North, South, East, and West, and through connections can there be made with a large number of passenger trains throughout central, northwestern, and northeastern Illinois. In addition to this service on that line between Yates City and Galesburg are scheduled two additional local trains each way; that the line between Concord Junction and Metropolis and Paducah, Kentucky, was opened for service about seventeen years ago and no regular passenger service has ever been operated between Paducah or Metropolis and Herrin and no effort has been made to build up a passenger service on said Concord-Paducah branch but on the contrary to discourage passenger patronage by neglecting and refusing to establish and maintain reasonably adequate passenger service and accommodations; that the line between Herrin and Concord Junction is operated in two divisions, one from Concord Junction to Centralia, and the other from Centralia to Herrin. These divisions are operated by mixed passenger and freight trains and local passenger train service which does not connect so that a trip can be made through from Herrin to Concord Junction, or vice versa, without waiting between divisions; that the passenger service has not been so operated as to adequately accommodate travel upon these local trains, nor to reasonably accommodate through travel at all; that there are no through trains between Herrin and Concord Junction or any

other point upon the Burlington system so as to give access to said system from Herrin to points in northwestern and central Illinois, nor generally to points upon the Burlington System; that the only service between Paducah or Metropolis and Herrin is freight train service upon which passengers may ride in dirty, inadequate, uncomfortable, insufficient, and unsafely operated coach or caboose cars used by the freight crews as caboose cars attached to the ends of local freight trains; that no separate passenger service, or reasonably comfortable and safe means of passenger travel has ever been operated upon this part of the line; that whatever passenger accommodations are or have been furnished upon freight trains is and has been unsafe, incommodious, uncomfortable, and inadequate to accommodate the public desiring to travel upon said line of railway in Illinois; that the city of Metropolis has only one other railway, the Illinois Central, and the service between Metropolis and St. Louis and other points on the lines of the Illinois Central is not a substitute for passenger service upon the railway of the respondent and does not afford means of railway travel to and from said city; that the railways of the Illinois Central System chiefly lie in entirely different territory from those of the respondent and such passenger trains as are operated on the Illinois Central are operated in co-ordination with the passenger trains on its system and does not give a direct connection to points in central, northern, and northwestern Illinois west of the main Chicago-New Orleans line of the Illinois Central Railroad Company.

(3) That if respondent should operate adequate through service from Metropolis to Bushnell through various connections the traveling public from southeastern Illinois would be enabled to reach the state capitol and other points in central, northern, and northwestern Illinois west of said line of the Illinois Central and the public convenience and necessity requires such a service; that the net revenue of the Burlington System is very large and amply adequate to justify the necessary expense of operating said service for the accommodation of the public; that the line from Concord Junction to Herrin is one of the best revenue producing lines of said system; that

the freight revenue derived from traffic on that part of the respondent's road is substantially equal to that upon its most paying lines and divisions in its whole system; that a large amount of freight received at Paducah is now hauled directly from Paducah, Kentucky, over this line to Galesburg, thence to Chicago, and from Shattuck Junction to St. Louis; that the figures introduced in evidence at the hearing at Springfield showed that the company derived considerable net freight revenue from its freight business on that part of the line from Paducah and Metropolis, to Herrin and that respondent had but recently obtained southern connections which give promise of a large increase in its freight revenues over that portion of the line as well as the remainder of the line from Herrin north to Concord Junction, Galesburg to Chicago and to the west from Galesburg; that there were no figures offered in evidence from which any passenger revenue on the portion of the line from Metropolis to Herrin could be estimated for the reason that no passenger service has ever been operated. There was a large amount of evidence introduced showing that Metropolis has entirely inadequate railway transportation facilities; that long circuitous routes must be taken and great inconvenience borne to each the northern, central, and northwestern portion of the state from Metropolis; that the growth of the city has been impaired, industries hampered on account of the inadequacy of train service and the inconvenient times at which train service is operated to and from that city and on account of the lack of convenient connections on the Illinois Central to other lines of railway to and from Metropolis.

[2, 3] (4) That freight service on the Burlington between St. Louis and Metropolis is more rapid than the mail service on the Illinois Central between St. Louis and Metropolis; that if a through passenger train service should be operated from Metropolis to St. Louis and from Metropolis to Concord Junction, Bushnell, and Galesburg that the through service and through connections to the part of the state in which the main lines of the Burlington line would be readily and easily accessible; that the line between Concord Junction and Metropolis is so located that numerous opportunities would be af-

forded to reach the northwestern, central, and northern parts of the state of Illinois upon other lines such as the Illinois Central, the Wabash, the Chicago & Rock Island, the Chicago & Alton, the Illinois Traction System and various other roads and connections over which the line from Concord Junction to Metropolis passes, and with which the same connects; that the railroad map of Illinois shows that the main lines of travel in the state of Illinois are either East and West across the state, or North and South through the state, or southwest and northeast through the state; that the line from Concord Junction southeast to Metropolis crosses practically all of the principal lines of railway in the state of Illinois and would give the people in the southeastern part of the state access to the principal lines of travel on the vaious railway systems throughout the state of Illinois and afford an outlet and a great convenience that is needed by the traveling public to reach the southeastern part of the state from the central and northern part and to reach the central and northern parts of the state from the southeastern part.

(5) That at the last hearing at Metropolis the witnesses who had offered in evidence figures at the hearing at Springfield showing the passenger revenue derived from passenger service on the portion of this railroad from Herrin to Concord Junction, and showing the revenue derived from freight traffic between Herrin and Metropolis, attempted to change the figures which he had introduced, but it appeared from his examination that he had revised his figures and changed the basis of calculation from that which had theretofore prevailed in order to reach that result. It is well known that the matter of apportioning revenues is very largely arbitrary and there is no reason for the Commission to assume that the figures first introduced were not accurate and based upon a proper theory of revenue apportionment.

[4] (6) The Commission further finds that it is the duty of every railroad company in the state of Illinois to operate a separate service for passengers and freight and that the operation of a freight train with passenger accommodations in a caboose car, or a car used substantially as a caboose attached to a freight train, or wholly by mixed trains, as testified to in this

case, is entirely inadequate to meet the public convenience and necessity in the territory as stated in the complaint, and is not a compliance with the charter duty of a railway company to operate both passenger and freight trains; that when a railroad company operates a railway within the state of Illinois in the transportation of intrastate passengers and freight, it assumes the charter obligation of operating both passenger and freight trains separately and adequate for the accommodation to the public for the transportation of each.

(7) The Commission further finds that the complainant is entitled to relief on behalf of the citizens of Metropolis and of the state of Illinois whom he represents in this proceeding; that the respondent, the Chicago, Burlington & Quincy Railroad Company, is under charter obligations to operate a separate passenger service between Metropolis and Herrin and that no such service has been operated; that the passenger service on the line of respondent's railway from Herrin to Concord Junction is inadequate; that the respondent should be required to operate a through service daily in each direction with the schedule so adjusted as that a passenger can leave Metropolis and reach the through service on the Burlington Railroad without stopping or waiting between divisions; that such service should be operated at such times as will accommodate the public either by a single train movement from Metropolis to Concord Junction or Galesburg, or in divisions which connect with each other and over which a passenger may be transported without break in travel by practically continuous movement from Metropolis to Concord Junction, and vice versa.

INDIANA PUBLIC SERVICE COMMISSION.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS et al.

v.

ALL RAILROADS OPERATING IN INDIANA.

[No. 8921.]

Commissions — Jurisdiction — Railroad — Trainmen.

The Indiana Commission is without jurisdiction over a petition

I.U.R.1928A.

for an order requiring a flagman or conductor on all light engine movements on the main track, either within or outside yard limits or both, to a point more than three miles distant from original starting point.

[June 24, 1927.]

PETITION to require a flagman or conductor on light engine movements in certain instances; dismissed.

Harmon, Commissioner: On March 20, 1927, the petitioners filed with the Public Service Commission of Indiana their petition, in which they ask this Commission to require, by official order or otherwise, all railroad companies operating within or through the state of Indiana, to furnish a conductor or flagman to accompany all light engine movements, when sent out on the main track, either within or outside yard limits or both, to a point more than three miles distant from original starting point.

The petition was duly considered and, it appearing to the Commission that said Commission was without jurisdiction of the subject matter and without jurisdiction to hear and determine the matters in said petition prayed for, and the opinion of the Attorney General of the state of Indiana having been obtained to the effect that the said Commission was without jurisdiction, after due notice had been given to each of the representatives of the several railroad organizations who filed said petition as aforesaid, that the said Commission deemed itself to be without jurisdiction of the subject matter of said petition and requested said representatives to show cause why said petition should not be dismissed; and the said petitioners failing to show cause why the petition should not be dismissed, the Commission now finds that the petition should be dismissed without prejudice to petitioners.

It is therefore *ordered* by the Public Service Commission of Indiana that the petition herein be and the same is hereby dismissed.

Singleton, Ellis, McIntosh, McCardle, Commissioners, concur.

INDIANA PUBLIC SERVICE COMMISSION.

RE INDIANAPOLIS STREET RAILWAY COMPANY.

[No. 763-M.]

Consolidation, merger, and sale — Evidence of ability to perform sales contract.

1. To warrant reconsideration by the Commission of a former ruling refusing permission to a traction utility to purchase capital stock in a bus utility, evidence is necessary to show that the selling party still has in fact possession of the stock and is yet in a position to carry out the terms of the original contract, p. 672.

Consolidation, merger, and sale — Desirability of stock purchase — Moot question.

2. The Commission will not decide the moot question of the advisability of a sale of capital stock by one utility to another where the contracting parties have no longer the ability to perform, p. 672.

[October 14, 1927.]

CONSIDERATION of the record of additional evidence submitted by the Circuit County Court to the Commission for opportunity to affirm or rescind its former order denying a petition of a traction company to purchase the capital stock of a motor utility which has been appealed to the said court; former order affirmed. For earlier decision, see P.U.R.1927D, 587.

Singleton, Chairman: On October 5, 1927, the Public Service Commission of Indiana received from the judge of the circuit court of Marion county, Indiana, transcript of the evidence introduced by the petitioner in this cause, the Indianapolis Street Railway Company, in appeal taken by said petitioner from the order of this Commission to the said circuit court of Marion county, Indiana. The said transcript has been studied and has been considered carefully by the Commission to determine whether this body should rescind or alter its original order issued herein.

In this cause the petition was denied in an order approved May 13, 1927 (P.U.R.1927D, 587). Thereafter petitioner filed a motion for rehearing, and rehearing was denied in formal order approved June 10, 1927. Subsequently petitioner filed with this Commission notice of appeal. A transcript of the pro-

ceedings before this Commission was prepared and forwarded to the circuit court of Marion county as provided by law.

The transcript submitted by said circuit court contains the additional evidence introduced before said court on hearing of said appeal. A part of the evidence so introduced has to do with an extension of the time of the contract between the Indianapolis Street Railway Company and the holders of the common stock of the Peoples Motor Coach Company, for the purchase of which stock, from said stockholders, the Indianapolis Street Railway Company had requested authority to issue its notes in the sum of $500,000, the same to bear interest at the rate of 8 per cent. The denial of this petition resulted in the appeal.

This Commission has been interested for some time to know whether the parties who contracted to deliver this common stock to the petitioner have continued to be in position to accomplish the terms of their contract. In an effort to determine this matter the Commission caused its accountants to inspect the books of the Peoples Motor Coach Company and to prepare a balance sheet for said company as of July 31, 1927. At that time the records of the Peoples Motor Coach Company showed that the common stock of said company was held by the same parties who had agreed to sell and deliver said stock to the Indianapolis Street Railway Company. Appreciating that such stocks may be transferred by delivery and that the records of the corporation might not disclose such transfers until some subsequent date the Commission caused its accountants to request of A. S. Bowman, president of the Peoples Motor Coach Company, the privilege of inspecting the shares of stock held by him in the Peoples Motor Coach Company. This request was made because an inspection of the stock certificates was deemed by the Commission to be final evidence of ownership inasmuch as the examination was being conducted without any person being placed under oath. In reporting the result of this request the Commission's accountants submitted the following statement:

"Mr. A. S. Bowman refused to show us the certificates shown as having been issued to him, stating that in his opinion 'It's none of the Commission's business.' Mr. Bowman said that he would advise Mrs. K. Bowman to refuse to show us the certifi-

cates belonging to her. Later Mr. Bowman stated 'Perhaps the certificates have been hypothecated,' and 'I may have borrowed money on them in New York or Philadelphia, in which case it would be impossible for you to see them unless you went to New York or Philadelphia.' "

Mr. Bowman refused to show said accountants the certificates shown by the records as having been issued to him, stating "It's none of the Commission's business." Mr. Bowman also said that he would advise Mrs. K. Bowman to refuse to show the certificates belonging to her.

[1, 2] This inquiry was made by the Public Service Commission on the theory that, if the shares of common stock proposed to be sold to the Indianapolis Street Railway Company should not at that time be owned by the parties to the contract of purchase and sale entered into by and with the Indianapolis Street Railway Company, said parties of course could not complete the terms of the contract. In the event these parties should not be in position to complete the terms of such contract, the Commission believes the appealed cause would be a moot question because the purported contract of purchase and sale is made with certain parties named in said contract. The great part of the case rests, the Commission believes, on the ability of the contracting parties to accomplish the terms of the contract.

As a part of the transcript submitted by the circuit court of Marion county an extension of the time and terms of the same contract was submitted as an exhibit. However, the transcript does not disclose that any evidence was offered to show that the parties to this contract have continued to be the owners of the stock to be sold. The Commission is impressed that such evidence would be necessary to support the original contract. This is especially true since the case is to be tried *"de novo"* and summarily.

In the Commission's order approved May 13, 1927, *supra,* appeared the following:

"The treasurer of petitioner testified that the street railway company sought the best terms possible to obtain the $500,000 loan; that the 8 per cent interest rate was the best obtainable, and that this difficulty was due to the earning power of busses

and the condition of the street railway company. The form of note to be given the bankers in negotiating the loan provides that all of the Peoples Motor Coach Company stock is to be deposited with the notes given as collateral securities for the loan." (P.U.R.1927D, at p. 597.)

The Commission finds nothing in the transcript submitted by the court that alters the statement by the treasurer of the Indianapolis Street Railway Company referred to above when he said: "This difficulty was due to the earning power of busses and the condition of the street railway company."

In the same order the Commission also stated:

"The Commission believes that the petitioner is not in position to make the purchase. The legal rate of interest in Indiana is 6 per cent per annum. The 8 per cent rate in the instant case is secured by contract. The contract includes the deposit of all the stock purchased as collateral security. All of the above facts considered together lead the Commission to believe that this investment would be hazardous." (P.U.R.1927D, at p. 597.)

The Commission finds nothing in the transcript submitted by the court to change its conclusions as stated above.

In the same order the Commission stated:

"This petitioner operates bus lines, some as feeder lines for its street railway system and others as through lines terminating at Monument Circle. It confesses loss in these operations; claims to believe that the feeder lines cause the loss, but has not made definite analysis to demonstrate that belief to be a fact." (P.U.R.1927D, at p. 598.)

The Commission fails to find in the transcript submitted by the court any analysis of losses claimed to have been suffered by the Indianapolis Street Railway Company showing that these losses have been caused by the operation of the feeder bus lines rather than by the operation of all petitioner's bus lines. In public hearing before the Commission the petitioner was asked specifically whether it could show definitely losses suffered by operation of feeder bus lines. The reply was that such distinguishment of losses had not been made. The Commission is

not inclined to accept the general statement when specific statements should be available.

W. M. Geiger, auditor of the Peoples Motor Coach Company, testified before the court that he had made a comparison of gross receipts by the Peoples Motor Coach Company between the period ending September 23, 1927, and the corresponding period ending September 23, 1926; that the gross receipts for said period in 1927 exceed the gross receipts for the corresponding period of 1926 by $43,000. When asked by the judge of the court whether the expenses during such compared periods had increased or decreased, his answer was, "I have no figures right at present. It would be only an estimate." The Commission submits that the gross revenues are much less informing than the net revenues in the accounting of any business.

Exhibit A in the circuit court is "Estimated gross revenues, operating expenses, depreciation, and net income for the year 1927 projected on the basis of statements of actual earnings for January, February, and March, 1927" by the Peoples Motor Coach Company. In this exhibit the result of proposed joint operation of the Peoples Motor Coach Company by the Indianapolis Street Railway Company is shown in the last column and shows that under the proposed joint operation the return to the owners of the stock would be "equivalent to return on investment of $500,000, 17.65 per cent." The Commission believes that this is entirely too much money to be a fair return.

In the report made by the Commission's accountants as of July 31, 1927, said accountants state that the net profit for the first seven months of 1927 by the Peoples Motor Coach Company was $6,493.93. If the Indianapolis Street Railway Company can take over a business that shows such profit during the first seven months of 1927, lop off the $12,000 per year paid to the president of the Peoples Motor Coach Company and institute other savings that will result in earning the above per cent on an investment of $500,000, the Commission believes that the property should be theirs. However, the history of the Indianapolis Street Railway Company's operation does not sustain promise set forth in petitioner's Exhibit A before the court as cited above.

Having considered carefully all of the matters submitted by the Marion circuit court in the transcript of this cause, the Commission finds no reason for altering orders heretofore promulgated in this cause.

It is therefore *ordered* by the Public Service Commission of Indiana that the judge of the circuit court of Marion County, Indiana, be and he is hereby informed that the Commission believes the orders heretofore promulgated by it in the instant case should be allowed to stand.

MISSOURI PUBLIC SERVICE COMMISSION.

RE SPRINGFIELD TRACTION COMPANY.

[Case No. 5290.]

Commissions — Jurisdiction over busses forming part of municipal transportation system.

1. Application of a traction utility to increase fares on its bus routes forming part of a municipal transportation system and lying for the most part within corporate limits will be dismissed for lack of jurisdiction under the Motor Bus Law (§ 1, 1927) providing that the act should not apply to motor vehicles transporting for hire over regular routes within or forming part of the transportation system of a municipal corporation where, prior to the act, the Commission had no jurisdiction over automobiles, p. 676.

Commissions — Jurisdiction over automobiles — Act of 1927.

2. Prior to the Motor Bus Law of 1927, the Public Service Commission of Missouri had no jurisdiction over motor busses and whatever authority it now has must be specified by the terms of that act, p. 676.

[November 5, 1927.]

APPLICATION for increased bus fares; dismissed for lack of jurisdiction.

By the **Commission:** The Springfield Traction Company of Springfield, Missouri, is a street railway corporation engaged in the business of operating a street railway system and auxiliary motor bus lines in the city of Springfield and its suburbs. On July 5, 1927, this company filed an application with the Public Service Commission seeking authority to increase its mo-

tor bus fares from 5 cents to 7 cents, to correspond with its street car fares.

A protest was filed with the Commission by approximately 600 persons protesting the proposed increase.

This case was heard by the Commission at the Commission's hearing room at Jefferson City, on the 22nd day of July, 1927.

[1, 2] The testimony in this case developed the fact that the major part of applicant's motor bus operations are within the corporate limits of the city of Springfield, a small part of the system being in adjacent suburban territory. The question of jurisdiction, therefore, arises. Section 1 of the Motor Bus Law passed at the session of the fifty-fourth general assembly of this state in 1927, has a provision which reads as follows:

"This act shall not be so construed as to apply to motor vehicles used in the transportation of passengers for hire, operating over and along regular routes within any municipal corporation, or municipal corporation and the suburban territory adjacent thereto, forming a part of a transportation system within such municipal corporation, or such municipal corporation and adjacent suburban territory, where the major part of such system is within the limits of such municipal corporation."

Counsel for the applicant contend that this Commission has jurisdiction of this case notwithstanding that part of § 1 above quoted, and base their contention upon the wording of the subsequent part of said § 1. This Commission held in other cases, instituted before the passage of the Motor Bus Law of 1927, that it had no jurisdiction over motor busses, and it is now of the opinion that it did not have jurisdiction of motor busses under the Public Service Commission Law as it existed prior to 1927. It, therefore, follows that if the Public Service Commission of this state has jurisdiction of motor bus operations wholly within the corporate limits of a municipality, or of a motor bus system within a municipal corporation and suburban territory, the major portion of which is within the limits of a municipality, the authority must be found in the law enacted by the legislature in 1927. This Commission understands that when the legislature said "This act shall not be so construed as to apply to motor vehicles" etc., it meant what it said, and we cannot,

therefore, look for authority anywhere in this act, either that part coming before the language quoted or that following. In other words, the word "act," as used in the sentence quoted, means the whole motor bus act and not merely a part of it.

The Public Service Commission believes that it should assume jurisdiction and exercise its authority in all cases where the language of the statute clearly indicates that it has jurisdiction and authority, but that it should not assume jurisdiction over any matter unless it clearly appears by the language of the statute that it has jurisdiction. In other words, the Public Service Commission of this state is a creature of the law, and has only such authority as is conferred upon it by statute, and the Commission is of the opinion that it should not assume jurisdiction of this case in the face of the express language of the statute above quoted.

Brown, Chairman, Ing, Porter, Commissioners, concur; Hutchison, Calfee, Commissioners, absent.

MISSOURI PUBLIC SERVICE COMMISSION.

RE CAPITOL STAGE LINES COMPANY.

[Case No. 5363.]

Certificates of convenience and necessity — Commission powers — Consent of other bodies — Motor bus operation.

1. The Commission is not compelled to wait upon the action of any city before granting a certificate of convenience and necessity to a motor utility, the majority of whose operations are outside of the corporate limits of such city, p. 684.

Certificates of convenience and necessity — Consent of municipality to proposed bus route.

2. Whether or not a city will permit a motor carrier to occupy the route selected by the carrier in its application for a certificate within its corporate limits is a matter to be determined by the city, p. 684.

Certificates of convenience and necessity — Jurisdiction of Commission over establishment of motor bus service.

3. The authority granted to the Public Service Commission of Missouri with reference to motor bus operations is wholly confined to the transportation of persons and that body has no jurisdiction to authorize an applicant for a certificate to carry express or freight, p. 685.

[November 29, 1927.]

APPLICATION of a motor utility for a certificate of convenience and necessity; granted.

By the Commission:

Statement.

This case is before the Commission on the application of the Capitol Stage Lines Company, incorporated, for a certificate of convenience and necessity to operate as a motor carrier from a fixed terminus in the city of Kansas City, Missouri, to a fixed terminus in the city of Jefferson City, Missouri, over State Highway, U. S. No. 50, and through the intermediate cities and towns of Lee's Summit, Warrensburg, Sedalia, Tipton, and California; and also from a fixed terminus in the city of Jefferson City, Missouri, to a fixed terminus in the city of St. Louis, Missouri, over State Highway U. S. No. 50, and through the intermediate cities and towns of Linn, Union, and Gray's Summit.

The city of Warrensburg, through its city attorney, filed a demurrer to the petition of the applicant in this case, on the ground that the Public Service Commission has no jurisdiction, so far as permitting the operation of the bus line in that city is concerned.

The American Railway Express Company presented an intervening petition against the assumption of jurisdiction by the Commission so far as it relates to the transportation of freight or express by hire, and it further asked that the clause in the application, seeking to carry express and like freight, be dismissed on the ground that the Commission has no jurisdiction as to that character of service.

The city of St. Louis, as it has done in other cases now pending before the Commission, and heretofore considered, protested the granting of a certificate to the applicant into that city, declaring that applicant has not secured a license or permit to operate its lines within the limits of the city as required by an ordinance. The intervener, city of St. Louis, further prayed that the application, so far as it pertains to the routes, service, and rates within to corporate limits of said city, be denied.

A protest was also filed by the Missouri Pacific Railroad Com-

pany, in which it made the statement that it is maintaining through passenger service between St. Louis and Kansas City and intermediate points, and that there are four other railroads also giving service between St. Louis and Kansas City; that the granting of a certificate to said applicant would result in diverting from said steam railroad carriers a great number of passengers and thereby reduce their revenues. They further protested that that part of the line operating between Jefferson City and St. Louis was started subsequent to December 1, 1926, and that there is no necessity or public convenience served by said applicant, which the said protestant and its competitive steam railroad lines are not giving.

A protest was also filed by the Wabash Railway Company, stating that it is one of five lines of steam railroads operating between St. Louis and Kansas City with twelve trains daily each way, and that the operation of the bus line would materially reduce their revenues and cripple the service they are now rendering.

A protest was filed by the Chicago, Rock Island & Pacific Railway Company, alleging that the proposed bus line parallels the lines of the steam railroads operating between St. Louis and Kansas City and that, like the other roads, it is giving service to a large number of people and that particularly between Rosebud and St. Louis, it is a direct competitor of said protestant from many stations.

The case was heard by the Commission at its hearing room at Jefferson City, Missouri, on the 31st day of August, 1927, due notice of the time and place of hearing having been given to all interested parties, and the case was submitted on the record.

Facts.

The testimony in this case shows that the principal office of the applicant is located at 1608 Charlotte Street, Kansas City, Missouri, from which point its various ramifications are directed, and that said applicant is engaged in the transportation of passengers by means of busses owned and controlled by it to the various points set out in the application along state highway, No. 50, from Kansas City to St. Louis, Missouri. The testi-

mony further shows that the applicant owns and proposes to put into service on this route, the following equipment:

6 Intercity type Fageol busses, 22 passenger capacity.
2 Chair car type Fageol busses, 24 passenger capacity.
2 Chair car type Fageol busses, 14 passenger capacity.

All of the above equipment is in first class condition and some of the busses were purchased as recently as March, 1927.

The testimony further shows that the said applicant has assets to the value of $38,783.84; and that its liabilities, exclusive of its capital stock, are $20,732.44; and that its capital stock, which is not par value, has a net worth of $18,051.40.

The testimony further shows that the applicant was incorporated as a motor carrier in August, 1925, and that the operation of the busses began on the 13th day of August, 1926, between Kansas City, Missouri, and Jefferson City, Missouri, and that the service has been continuous since that date.

The testimony shows that the company started the operation of its line from Jefferson City to St. Louis in February, 1927, since which date it has constantly maintained a regular schedule of two busses daily each way.

The testimony further shows that the owner of the majority of the stock in this line is its manager, Mr. J. J. Petrasek, who had many years of experience as a bus operator prior to the time of the incorporation of the Capitol Stage Lines, and that he is thoroughly qualified to conduct its operations and put it upon a firm financial basis. The service first started with two round trips per day each way between Kansas City and Jefferson City, and that service has been supplemented since by new schedules according to the public demand until to-day the company is operating between Kansas City and Jefferson City, three round trips daily and an extra trip between Kansas City and Sedalia.

The testimony further shows that on its line from Jefferson City to St. Louis, it is operating two busses daily each way. The applicant in its supplemental application, asks for permission to operate three daily schedules in addition to the above schedules to Lee's Summit, Missouri, leaving Kansas City at 9 A. M. and 4 P. M., daily and on Saturdays and Sundays and

holidays, another bus at 11:30 P. M. This supplemental service has not been in operation, but the applicant expects to begin the same when his certificate of convenience and necessity is granted, should the Commission deem that such supplemental service is necessary to public convenience.

The applicant has also filed a tariff schedule, showing fares charged between all points touched by the operation upon its entire line from Kansas City to St. Louis, Missouri, with a charge of $8.65 for the round trip between Kansas City and St. Louis and vice versa. It also has a thirty day round trip ticket rate between Kansas City and St. Louis, and all points intermediate, at a slightly reduced figure from its published tariff schedule. It has also put into effect a reduced rate to school children of a fare and one-half of the full fare on school days only, which said reduced rates are granted only upon presentation of an identification card by children at the time of boarding the bus.

The applicant filed with the Commission, liability insurance policies covering all of the busses which it expects to place in service.

Appearance for the city of Lee's Summit was made by the acting mayor, J. F. Stevenson, and members of the city council. Their objections were to the supplemental application for the extra service between Kansas City and Lee's Summit, which conflicts with the schedules of Messrs. Akers and Diehl, operators of a local service between these points. The testimony of the officials of the city of Lee's Summit indicated that they are satisfied with the service rendered by the bus firm of Akers & Diehl. Testimony of the witnesses also showed that they believe the busses of the applicant would not operate over the city streets of Lee's Summit, but would only operate upon the state highways which do not enter the business part of the city. The testimony also shows that the applicant's busses, on a regular schedule between Kansas City and Jefferson City, go through Lee's Summit at the time listed therein, and that the supplementary service proposed for Lee's Summit would be an addition to the service which they are now rendering.

The applicant placed a large number of witnesses upon the stand from the cities of Linn, Mt. Sterling, and Rosebud, and

all of them testified that there is need for said service between Jefferson City and St. Louis; and that it would be a great convenience for them, and that it is a matter of necessity, as many of them are inland towns, and have no other means of communication without going a long distance to take the trains of the protestants, particularly between Rosebud and St. Louis. The witnesses testified that the trains running on the Rock Island, one of the protestants, are at such inconvenient hours that the bus line, as operated under its present schedule is a great convenience to the cities from Rosebud to Union, which points are touched by said protestant, the Rock Island Railroad.

The testimony of Mr. Fred Akers, the operator of the bus between Kansas City and Lee's Summit, shows that the line with which he is connected started operation in March, 1925, and that the firm of Akers & Diehl has been rendering continuous service since that time. He testified that they are operating five schedules daily between Kansas City and Lee's Summit, with an extra run on Saturday evening and one on Sunday.

The testimony of Mr. Fred Diehl, member of the firm of Akers and Diehl, operating a bus line from Lee's Summit to Kansas City, corroborated that of Mr. Akers. Mr. C. W. Childers, an alderman of Lee's Summit, endorsed the bus line of Messrs. Akers and Diehl, and said that it will give sufficient service for the residents of that city.

Mr. H. H. Butler, who has been connected with the passenger department of the Missouri Pacific Railroad Company for a great many years, took the witness stand and stated that the Missouri Pacific Railroad Company is operating six trains daily each way between Kansas City and Lee's Summit, of which six, a number of them make regular stops at Lee's Summit while others stop on flag. He also stated that there are four trains each way daily over the line between St. Louis and Kansas City, and that part of the way, between Jefferson City and Kansas City, there are five trains. He also stated that there are four trains each way daily on the Wabash Railroad; two each way on the Rock Island; and two each way on the Chicago and Alton, making a total of twelve trains daily between St. Louis and Kansas City. He further stated that bus service be-

tween these two points might result in the diminution of the railroad service, and that the Missouri Pacific spent in wages in Jefferson City, annually, $1,216,000; in Sedalia, 2,889,000; in Kansas City, $3,985,000, and in St. Louis, $11,019,000. He further stated that the percentage of decrease of the revenue of the Missouri Pacific, as a system in the year 1926 as compared to the year 1923, was 15.4 per cent and the decrease of the number of passengers carried was 43.1 per cent, all of which he ascribed to the automobiles and busses. Exhibits were filed by the protestant, Missouri Pacific Railroad Company, giving a tabulation showing the decrease in business as a result of the operation of bus lines throughout its territory. He further stated, on cross examination, that private automobiles took a larger percentage of the revenue from the railroads than the automobile busses.

C. B. Ogle, representing that Chicago, Burlington & Quincy Railroad Company stated that applicant's bus line encountered his railroad at the terminal points, and he thought that placing the busses in service between St. Louis and Kansas City would greatly reduce the number of passengers that patronized, not only his line, but other railroads between the two cities.

Mr. L. A. Blatterman, general passenger agent of the Wabash Railway Company, also stated that the operation of the proposed bus line is inimical to the interests of his line, as well as that of the other railroads.

Mr. James Schemerhauser, of Tipton, Missouri, stated that the city council of Tipton is opposed to the applicant's busses operating on its down town streets, and asked that the Public Service Commission restrict it to the state highways. He stated that the city council would recommend a route for the busses to reach the hotel in the city, which the attorney for the applicant agreed should be followed.

The case was submitted on the record.

Conclusion.

It may be true, as contended by protestant, that the Missouri Pacific Railroad Company and other carriers between Kansas City and Jefferson City are affording adequate service for all

who may wish to travel by rail, but the fact remains that the applicant was operating as a motor carrier, rendering satisfactory and dependable service, on and prior to December 1, 1926, between said points. Under the provision of the 1927 motor-bus law as contained in § 11 thereof, the presumption is thus created that the service rendered is necessary, and, in the absence of testimony overcoming such presumption, the applicant is entitled to a certificate of convenience and necessity.

The testimony as a whole, shows that the service being rendered between the cities of Jefferson City and St. Louis is necessary to public convenience, and since there is no other motor carrier operating between said cities, and the testimony indicates a demand of persons living along the route for such service, the Commission finds that the applicant is entitled to a certificate of convenience and necessity to operate as a motor carrier between said cities.

The Commission is of the opinion that the applicant has failed to show the necessity or convenience for the service asked for in its supplemental application, between Kansas City and Lee's Summit, but that the public convenience and necessity is now adequately served.

[1, 2] The Commission, in orders heretofore issued, has passed upon the contention of the city of St. Louis relative to the jurisdiction of the Commission to issue certificates of convenience and necessity to motor carriers desiring to operate over its streets, in the absence of authority granted by the city authorizing such motor carriers to occupy its streets. The Commission heretofore has ruled, and is still of the opinion, that this Commission is not compelled to wait upon the action of the city of St. Louis, or other cities within the state, before granting a certificate of convenience and necessity to a motor operator, the majority of whose operations are without the corporate limits of such city. In so holding the Commission does not deny or question the right of the city of St. Louis and other cities of the state to exercise a reasonable control of the use of their streets as is guaranteed to them by law. As to whether or not the city will permit the carrier to occupy the route se-

lected by the carrier within the corporate limits of the city, is a matter to be determined by the city. The Commission either grants, or withholds, a certificate of convenience and necessity to operate between fixed termini as the facts of the particular case may warrant. In other words, the Commission passes upon the question as to whether there is a public necessity and convenience for such service. In so holding, the Commission is not to be understood as saying that the city has not all the rights guaranteed to it by statute relative to the control of the use of its streets. This statement with reference to the contention of the city of St. Louis will also apply to the contention of the city of Warrensburg.

[3] With reference to the intervening petition of the American Railway Express Company, the Commission finds that there is merit in said intervener's contention that this Commission has no jurisdiction to authorize the applicant to carry express or freight, and we, therefore, hold that that part of the applicant' petition should be denied. The authority granted to the Commission with reference to motorbus operations is wholly with reference to the transportation of persons.

After a careful consideration of all the evidence presented in this case, the Commission is of the opinion that public convenience and necessity require motorbus service over the entire route between Kansas City and Jefferson City, Missouri, and also between Jefferson City and St. Louis, Missouri, over state route U. S. 50, as described in the application and exhibits herein, and that the time schedules and rates of fare as shown by the application and exhibits, should be allowed and filed with the Commission.

Brown, Chairman, Ing, Porter, Commissioners, concur; Calfee, Hutchison, Commissioners, absent.

P.U.R.1928A.

NEBRASKA STATE RAILWAY COMMISSION.

RE C. C. COTNER BUS LINE.

[Application No. 6774.]

Monopoly and competition — Motor bus companies — Avoidance of duplication — Schedules.

A motor bus company operating between points served by other carriers should so stagger and arrange its schedule as to avoid duplication of service, and to render the operation of motor transportation companies over the same route safe and the service offered convenient.

[June 30, 1927.]

APPLICATION for approval of bus routes and schedules; application granted with modifications.

Appearances: C. C. Cotner, Plattsmouth, for applicant; L. D. Densmore, Secretary, for the Commission; Russell J. Walsh and I. Gilinsky, for the bus lines operating over the route in question.

By the **Commission**: Application is presented by C. C. Cotner of Plattsmouth, Nebraska, who desires to operate a bus line as a motor transportation company, as defined by § 1, House Roll No. 93, laws of Nebraska for 1927, between Plattsmouth and Omaha, Nebraska, and requests the Commission's approval of service schedules showing the time of arrival and departure of his motor vehicles at each station on his route and the number of trips made daily, and also for approval of the route over which said bus line operates. The name of such motor transportation company to be C. C. Cotner Bus Iine.

A formal hearing was held by the Commission at 2 o'clock P. M. Thursday June 23, 1927, notice of the time and place of which having been given to interested parties. At this hearing interested parties were represented as shown by appearances set forth above.

The route over which applicant desires to operate and the proposed schedule, is as follows:

Route

Plattsmouth—Omaha.

From Morgan's Sweet Shop, Plattsmouth, Nebraska, by way

of U. S. Highway No. 75, to Henshaw hotel, Omaha, Nebraska, as shown by marked route (in blue) on state highway map attached to application.

Schedule

Plattsmouth—Omaha

Northbound (Read down)			Leave Daily Stations	Southbound (Read up)		
		Lv.		Ar.		
8:30 A.M.	1:30 P.M.	6:30 P.M.	Plattsmouth	12:25 P.M.	5:25 P.M.	11:55 P.M.
8:45 A.M.	1:45 P.M.	6:45 P.M.	La Platte	11:55 A.M.	4:55 P.M.	11:25 P.M.
8:55 A.M.	1:55 P.M.	6:55 P.M.	Ft. Crook	11:45 A.M.	4:55 P.M.	11:15 P.M.
9:25 A.M.	2:25 P.M.	7:25 P.M.	Omaha	11:30 A.M.	4:30 P.M.	11:00 P.M.
		Ar.		Lv.		

The record discloses that the following railroad service is available between Plattsmouth and Omaha, leaving Plattsmouth daily: M. O. P. 6:17 A. M., Chicago, Burlington & Quincy 8:10 A. M., M. O. P. 2:58 P. M., Chicago, Burlington & Quincy 3:05 P. M., M. O. P. 7:23 P. M.; and railroad service between Omaha and Plattsmouth, leaving Omaha daily as follows: Chicago, Burlington & Quincy 9:30 A. M., Chicago, Burlington & Quincy 1:30 P. M., M. O. P. 2 P. M., Chicago, Burlington & Quincy 3:45 P. M., M. O. P. 6:03 P. M., Chicago, Burlington & Quincy 8:05 P. M., M. O. P. 11:58 P. M.

The Commission has heretofore approved bus routes over the proposed route of applicant for the Interstate Transit Lines and for the DeLuxe Bus Service, motor transportation companies now operating between Omaha and Plattsmouth, and has approved service schedules for said motor transportation companies which now render daily bus service between said points as follows:

Interstate Transit Lines, daily bus service, leaving Omaha daily at 9:30 A. M. and 4:15 P. M., and leaving Plattsmouth for Omaha daily at 11:20 A. M. and 6:50 P. M.

De Luxe Bus Service, daily bus service, leaving Omaha for Plattsmouth daily at 7:30 P. M., 12 noon and 5:15 P. M., and leaving Plattsmouth for Omaha daily at 9 A. M., 1:30 P. M. and 7 P. M.

In addition to the above service, applicant desires to offer three bus trips daily from Plattsmouth to Omaha and return.

The Commission further finds that the said De Luxe Bus

Service, a motor transportation company owned and operated by Israel Gilinsky, has pioneered this bus run and has been offering bus service between said points for the past four years, over roads which were not graveled and which were at times almost impassable. The road over which the Interstate Transit Lines and the De Luxe Bus Service now operate, and over which applicant desires to operate, has recently been graveled and is now in good condition.

The questions as to whether the service offered by applicant, in addition to that service by the railroads and the Interstate Transit Lines and the De Luxe Bus Service, is necessary to adequately handle the passenger traffic between Plattsmouth and Omaha, or whether from a business standpoint the additional service is justified, is not passed on by the Commission.

The Commission is of the opinion that the schedule as set forth in the application duplicates the service now available, concerning which there has been no complaint, and that said schedule should be rearranged and so staggered as to avoid duplication of service, and to render the operation of motor transportation companies over the same route safe, and the service offered convenient.

The following route and schedule will, therefore, be approved, subject to complaint.

Route

Plattsmouth—Omaha.

From Morgan's Sweet Shop, Plattsmouth, Nebraska, by way of U. S. Highway No. 75, to Henshaw hotel, Omaha, Nebraska, as shown by marked route (in blue) on state highway map attached to application.

Schedule

Plattsmouth—Omaha

Northbound (Read down)			Leave Daily Stations	Southbound (Read up)		
		Lv.		Ar.		
7:00 A.M.	12:30 P.M.	7:30 P.M.	Plattsmouth	11:25 A.M.	3:25 P.M.	11:55 P.M.
7:15 A.M.	12:45 P.M.	7:45 P.M.	La Platte	10:55 A.M.	2:55 P.M.	11:25 P.M.
7:25 A.M.	12:55 P.M.	7:55 P.M.	Ft. Crook	10:45 A.M.	2:45 P.M.	11:15 P.M.
7:55 A.M.	1:25 P.M.	8:25 P.M.	Omaha	10:30 A.M.	2:30 P.M.	11:00 P.M.
		Ar.		Lv.		

P.U.R.1928A.

ORDER.

It is therefore *ordered* by the Nebraska State Railway Commission that the bus routes and service schedules as set forth in the findings hereof and in the application of the C. C. Cotner Bus Line, a motor transportation company owned and operated by C. C. Cotner, Plattsmouth, Nebraska, be and the same are hereby approved and said motor transportation Company is hereby authorized to operate as a motor transportation company, over such routes and upon said schedules.

It is *further ordered* that said motor transportation company shall not operate over any other than the approved route without the express permission of the Commission, unless the approved route is temporarily blocked or otherwise impassable.

It is *further ordered* that said motor transportation company shall not increase, abandon, or make any departure from the approved route except by authority obtained from the Commission.

It is *further ordered* that said motor transportation company shall not make any change in the schedules herein approved without obtaining authority from the Commission to make such changes and that said motor transportation company shall operate its motor vehicles in accordance with schedules approved herein.

NEBRASKA STATE RAILWAY COMMISSION.

RE OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY.

[Application No. 6970.]

Security issues — Material evidence at hearing — Municipal acquisition — Refunding debts.

1. The Commission cannot consider an objection regarding the possible interference with proposed future efforts of a municipality to acquire a utility's property, in a hearing on an application by the latter for approval of a security issue for the purpose of refunding outstanding obligations, p. 691.

Valuation — Evidence of value — Security issues — Master's report.

2. The findings of a Master appointed by a Federal District Court, although not conclusive as to value of utility property, are evidence of a high order, p. 692.

Valuation — Ascertainment of original cost — Increased values — Bridges.

3. The Commission will not make a finding of value based solely upon cost, in view of increased values since construction, as well as the decisive precedents set by the United States Supreme Court, p. 693.

Commissions — Duty to follow decisions of superior court — Requirements of official oath.

4. Refusal of a State Commission to be guided by the decisions of the Supreme Court of the United States and of its own state to the effect that reproduction new less depreciation must be given consideration in the ascertainment of fair value would be a violation of their official oaths, p. 694.

Valuation — Ascertainment generally — Reproduction less depreciation.

5. Reproduction new less depreciation is the dominant factor in the ascertainment of fair value, p. 694.

Constitutional law — Impairment of contracts — Security issues — Excessive bond issue.

6. The issue of new bonds to take up outstanding valid obligations will be authorized even in excess of two-thirds of the value of paid up capital stock, notwithstanding a law (§ 462, Compiled Statutes of Nebraska, 1922) prohibiting an issuance of such proportions where the indebtedness was created by original bonds also issued in excess of two-thirds of the value of paid up capital stock but prior to the regulatory act, which may not, by retroaction, thus impair the obligation of a contract in violation of the Federal Constitution (Art. 1, § 10), p. 695.

Security issues — Proportion of bonds to stock — Invalid issues — Outstanding lawful obligation.

7. The issuance of bonds in excess of two-thirds of the amount of paid up capital stock will be authorized notwithstanding a law prohibiting issuance in such proportion where the purpose is to take up valid and lawful outstanding obligation created by an original bond issue also in violation of the two-third rule, p. 695.

[November 3, 1927.]

APPLICATION of railroad company for authority to issue refunding bonds; approved.

Appearances: John L. Webster, General Counsel, R. A. Leussler, vice-president and general manager, for the applicant; Senator R. P. Howell, for himself, and others; Hugh LaMaster, Deputy Attorney General, B. E. Forbes, Chief Engineer, for the Commission.

P.U.R.1928A.

By the **Commission**: This is an application of the Omaha & Council Bluffs Street Railway & Bridge Company, for authority to issue its refunding bonds in the amount of $2,000,000. The application states that the company was originally incorporated under the laws of Iowa, October 20, 1886, and on the 9th of April, 1887, the same incorporators organized a corporation under the laws of Nebraska, under the same name. Thereafter, and prior to the construction of the bridge, hereinafter mentioned, the two corporations were merged so that at the present time it is both an Iowa and a Nebraska corporation. The company constructed and still owns the street car system in the city of Council Bluffs, Iowa, with extensions to nearby suburbs of that city. It also built and owns a bridge across the Missouri river, joining Omaha and Council Bluffs, which carries the street car lines of the Council Bluffs system over into this state. The bridge is also used by vehicles and pedestrians as a toll bridge. The entire property of the applicant company is leased to the Omaha & Council Bluffs Street Railway Company, a Nebraska corporation owning and operating a street railway system in the city of Omaha.

On January 1, 1903, the applicant company issued its negotiable bonds bearing interest at 5 per cent in the sum of $2,000,000 due in twenty-five years, or January 1, 1928. Such bonds are a first lien on all the property of the applicant company. The purpose of the present application is to refund these bonds.

The prayer of the application is for permission to issue $2,000,000 of negotiable bonds bearing interest at the rate of 6 per cent dated October 1, 1927, maturing October 1, 1947, secured by a trust deed upon all of the property of the applicant company, both in Iowa and in Nebraska, and including the bridge above mentioned and all of the rolling stock and miscellaneous property of the applicant. An arrangement has been made whereby the bonds, if issued, will be sold to net the company 93½. The discount will be assumed and paid by the Omaha & Council Bluffs Street Railway Company, the lessee.

[1] Objection was made to the allowance of the application by R. B. Howell, who appeared for himself and other similar-

ly interested, all being citizens of Omaha, Nebraska. The objection seemed to go to the value of the bridge property as claimed by the applicant and to the allowance of the application because it might interfere with the efforts of some of the citizens of Omaha to secure the bridge for municipal purposes. Under the provisions of the statute governing the Commission in this class of cases, the Commission cannot give consideration to the latter ground of objection. We have nothing to do with the proposed purchase of the bridge by the city of Omaha. The matter before the Commission is an application for permission to issue securities for the purpose of refunding outstanding obligations. If the property is of sufficient value, and the application correctly states the needs of the company it is entitled to issue the securities.

The first matter for our consideration is to ascertain whether or not the security offered for the bonds is adequate. It appears from the testimony of the applicant that the value of its street railway property taken by itself, that is, the bridge not being included, has recently been a subject of litigation in the United States District Court for the southern district of Iowa. The Master appointed in that case has filed his report in which he found the present fair value of the street railway property to be $2,809,419.83; that the present fair value of the bridge property is, without anything for going concern value, $2,000,000. This makes the present fair value of the entire property, but not considering the going concern value of the bridge property, $4,809,419.83. The report is dated October 11, 1927 and has not yet come before the court for consideration. The evidence offered before the Commission shows a large intangible value in the bridge property.

[2] While the findings of the Master are not conclusive as to value, they are evidence of a high order that the value of the applicant's property must be, including the going concern value of the bridge property, nearly $5,000,000.

The applicant also presented a valuation made by Ralph Modjeski, a well known civil engineer, who found a present value of $2,673,058.09 for the bridge property. The actual valuation was made by Phillip P. Angier as of September 9, 1927, under

the supervision of Mr. Modjeski. It seems to have been made for the use of the purchaser of the proposed bonds. While neither Mr. Modjeski nor Mr. Angier was present before the Commission, Mr. Leussler, general manager of the Omaha & Council Bluffs Street Railway Company, the lessee of the property, was present and testified generally as to the value of the property. He spoke with intimate knowledge of much of the property and his testimony fully sustains the figures given by the Special Master and the figures given by Mr. Modjeski. We, therefore, find that the present fair value of the property is ample to justify the proposed bond issue which will be a first lien on all of the property of the applicant.

In addition, the Omaha & Council Bluffs Street Railway Company, under the provisions of the lease, will guarantee the payment of the interest on the new bonds.

It was urged by Mr. Howell that the finding of the Commission should be based solely upon original cost and additions and betterments and not upon actual present cost of reproduction new less depreciation.

No one testified as to the original cost of the property. Mr. Leussler testified that the original cost figures of the bridge property were not properly kept and that even such as were kept, were not available.

[3] While the cost figures are not before us we wish to say that this Commission would not make a finding of value based solely upon cost. In view of the fact this bridge was constructed in 1888, and there has been a vast advance in the cost of material and labor since that date, we deem that matter too well settled to admit of discussion. The subject has been before the Supreme Court of the United States many times. We take occasion to call attention to two of the late cases.

In Standard Oil Co. v. Southern P. Co. 268 U. S. 146, 156, 69 L. ed. 890, 45 Sup. Ct. Rep. 465, the Court used the following language in discussing the subject of value:

"And by numerous decisions of this Court, it is firmly established that the cost of reproduction as of the date of valuation constitutes evidence properly to be considered in the ascertainment of value."

[4] In the recent case of McCardle v. Indianapolis Water Co. decided November 22, 1926, 272 U. S. 400, 71 L. ed. 154, P.U.R.1927A, 15, 23, 47 Sup. Ct. Rep. 144, the Court said:

"It is well established that values of utility properties fluctuate, and that owners must bear the decline and are entitled to the increase. The decision of this Court in Smyth v. Ames, 169 U. S. 466, 547, 42 L. ed. 819, 849, 18 Sup. Ct. Rep. 418, declares that to ascertain value 'the present as compared with original cost of construction' is, among other things, a matter for consideration. But this does not mean that the original cost or the present cost or some figure arbitrarily chosen between these two is to be taken as the measure. The weight to be given to such cost figures and other items or classes of evidence is to be determined in the light of the facts of the case in hand. By far the greater part of the company's land and plant was acquired and constructed long before the war. The present value of the land is much greater than its cost; and the present cost of construction of those parts of the plant is much more than their reasonable original cost. In fact, prices and values have so changed that the amount paid for land in the early years of the enterprise and the cost of plant elements constructed prior to the great rise of prices due to the war do not constitute any real indication of their value at the present time."

It was suggested at the hearing by the objectors that this Commission should disregard the holdings of the Supreme Court of the United States.

We decline to follow this astounding suggestion. We shall be guided, as heretofore, by the decisions of the Supreme Court of the United States and the supreme court of Nebraska. We shall not take time to discuss our duties at length, but shall simply say that to follow the suggestion of the objectors would require a violation of our official oaths. It is the expression of an idea subversive of all government.

[5] Reproduction new less depreciation is the dominant factor in the ascertainment of fair value.

Columbus Gas & Fuel Co. v. Columbus, 17 F. (2d) 630, P.U.R.1927C, 639.

The second phase of this application is the relation between

the company's stocks and its bonds. The applicant furnished evidence as to the amount of its securities now outstanding. The stocks consist of preferred stock of $1,500,000 and common stock of $1,500,000, all of which appears to be paid up in full. It also appears in the evidence that there is other indebtedness besides the $2,000,000 bonded indebtedness.

[6, 7] The question immediately arises as to whether or not the Commission is authorized to allow the issuance of these bonds when the indebtedness of the concern exceeds two-thirds of the amount of the paid up capital stock. We regard § 462, Compiled Statutes of Nebraska for 1922, as in full force and effect and that we have no right to disregard that statutory provision in authorizing a bond issue. If this were an original issue we should be constrained to hold that the two-thirds rule applies, but under the circumstances of this case the rule cannot apply for the following reasons:

The outstanding bonds were issued on January 1, 1903, which was long prior to the adoption of the constitutional provision creating this Commission and long prior to the enactment of the Stock and Bond Act. It appears that the company received full value for the $2,000,000 in bonds which were issued and that the proceeds thereof went into actual construction of the applicant's property.

It does not appear that at the time of the issue of the original bonds there was a violation of the two-thirds rule. That being the case the bonds of course were perfectly valid and are now valid and being a lawful obligation we are required, under the Stock and Bond Act, § 676, Compiled Statutes of Nebraska for 1922, to authorize the new bonds to take up such outstanding valid obligations. Further, it should be said that even if the bonds had been issued originally in violation of the two-thirds rule, the money actually having gone into the property of the company and the company having received full benefit thereof, the obligation would be valid and subsisting. The company could not plead *ultra vires* against it. 14-A C. J. § 2534, p. 589. Kraniger v. People's Bldg. Society, 60 Minn. 94, 61 N. W. 904; Sioux City Terminal R. & Warehouse Co. v. Trust Co. of North America, 173 U. S. 99, 43 L. ed. 628, 19 Sup. Ct. Rep.

341; Simmons v. Farmers Union Co-op. Asso. 114 Neb. 463, 208 N. W. 144.

As this was a valid and subsisting obligation at the time of the adoption of the stock and bonds act, it was under the protection of the Constitution of the United States, Article I, § X, prohibiting any enactment impairing the obligation of a contract.

We, therefore, find that the security is ample for the protection of investors in the proposed securities and that the applicant is entitled to an order of this Commission authorizing the issue of $2,000,000 bonds as prayed.

NEW JERSEY BOARD OF PUBLIC UTILITY COMMISSIONERS.

RE WEST JERSEY AND SEASHORE RAILROAD COMPANY et al.

Monopoly and competition — Restriction of competitive operation — Street dedication — Railroad.

1. An agreement by a city with a railroad not to allow future operation of any railway or motor vehicle used as a common carrier on a street, part of the land for which is thereupon dedicated by the railroad, is a reasonable and proper restriction against competition, p. 698.

Monopoly and competition — Restriction of regulation of highway transportation — Railroad.

2. An agreement between a city and a railroad, which has dedicated land for an adjacent street, not to permit carrier operations of any mode by anyone upon a certain highway without first offering the railroad the exclusive right to furnish the same on equal terms, is not a proper restriction against competition but rather a hindrance to the determination of the use of the street for transportation purposes from the standpoint of public necessity, p. 698.

Municipalities — Surplusage in a contract — Blind waiver — Railroad.

3. An unexplained and irrelevant clause confirming the right of a railroad to operate and maintain its lines within a city, in a contract between these two parties, will be stricken out as surplusage because of the possibility of an inadvertent waiver of rights by the city, p. 699.

[October 24, 1927.]

PETITION to approve agreement providing for the installation of certain grade crossings; contract approved with certain qualifications.

P.U.R.1928A.

Appearances: George A. Bourgeois for the railroad company; John O. Bigelow for the Board.

By the **Board**: The West Jersey & Seashore Railroad Company owns a right of way running from north to south through Margate City in the middle of Atlantic avenue. Along this right of way are operated electric cars in the same manner in which street cars are usually operated, that is to say, the cars are operated as units and not in trains, and they stop to pick up or discharge passengers when signalled at every cross street and not at passenger stations. In addition to this street car movement, the railroad company operates one freight train a day in each direction over these tracks.

The right of way for most of its length, is 100 feet wide, but the railroad only uses a strip 24 feet 3 inches wide for its tracks.

The railroad company and the city of Margate City have petitioned the Board to approve a contract made between them and dated February 15, 1927. The gist of this contract is that the railroad shall dedicate for ordinary street purposes so much of this right of way as is outside of the strip of land 24 feet 3 inches in width and that they will abandon and remove their freight handling facilities, consisting of a freight yard and freight switches at Brunswick avenue. The contract also contemplates that the city may construct crossings across the railroad tracks at the grade thereof. As the movement on these tracks with the exception of the two freight trains daily, is solely a street car operation, no objection is seen to the construction of these grade crossings.

The evidence discloses that there is no probability that the railroad company will need in the future, in order adequately to serve the public, that part of its right of way which it proposes to dedicate for a street. It also appears that the railroad will be able conveniently to handle freight intended for Margate City at one of its yards in Atlantic City or in its yard in Longport, south of Margate City. No part of Margate City is more than two miles distant from one or other of these yards. Margate City is essentially a residential community and has no need for more freight facilities than will be provided by the Longport and Atlantic City yards.

[1] In return for these concessions by the railroad, the city makes certain agreements on its part, only three of which need be mentioned. It agrees in paragraph four of the contract that Atlantic avenue shall not be used for the operation of any railway or motor vehicles carrying passengers for hire, or used as common carriers. As Atlantic avenue will consist principally of the land dedicated by the railroad, this restriction against competition with the company's street car business seems to the Board reasonable and proper.

[2] In the same paragraph of the agreement, the city also agrees that Ventnor avenue, which is parallel with Atlantic avenue and one block distant therefrom, will not be used for the operation of any railway, bus, or other transportation line, without first offering to the railroad company, its allied or subsidiary companies, the exclusive right to furnish said transportation on equal terms offered by others. The contract further provides if such right is granted to others, that as often as an application is made for changes in the terms "such application or proposal shall constitute a surrender of the rights of the person or corporation having such rights in the streets above mentioned and shall be considered as a new application conferring on the West Jersey & Seashore Railroad Company, its allied or subsidiary companies, the right within the time above specified (ninety days) to avail itself of the privilege of accepting such right or franchise in said streets, upon the terms so proposed."

All permits for the operation of auto busses are granted on certain terms as to the number of busses to be operated, the fare charged, etc. With changing conditions, applications for changes in the terms of operation are frequently made. Under the provision of the contract above referred to, if a bus company should obtain the right to operate on Ventnor avenue, it could not thereafter apply for a change in the terms of its permit except at the risk of the railroad company stepping in and ousting it from the street.

The contract so far as it applies to Ventnor avenue must be disapproved. The use of Ventnor avenue for transportation utilities should be determined from the standpoint of public necessity and convenience when application for such use is made, and unhampered by old agreements.

P.U.R.1928A.

[3] By the sixth paragraph, the city confirms the right of the railroad company to operate and maintain its railroad through the city.

No evidence was submitted as to the effect of this paragraph. Counsel for the railroad company at the hearing indicated that it was inserted from an abundance of caution and not because the right of the railroad so to operate, had ever been questioned. This paragraph would, therefore, seem unnecessary. On the other hand, if there is some flaw in the railroad company's title now unknown to the parties to the contract as well as to the Board, the Board should not blindly approve a provision which might waive valuable rights of the city.

The contract is approved except so much of the fourth paragraph as relates to Ventnor avenue and except the sixth paragraph which are disapproved.

NORTH DAKOTA BOARD OF RAILROAD COMMISSIONERS.

VILLAGE OF STARKWEATHER
v.
NORTHERN UTILITIES CORPORATION.

[Cases Nos. 2722, 2775.]

Valuation — Working capital.

1. A reasonable allowance should be made for working cash capital in a valuation for rate making, p. 702.

Valuation — Going concern value.

2. A reasonable allowance should be made for going concern value in a valuation for rate making, p. 702.

Depreciation — Necessity for allowance.

3. An allowance was made for depreciation or retirement expense in determining the necessary rate of a public utility, p. 704.

Return — Electric utility — Amount.

4. An allowance of 8 per cent was made for the return of an electric utility, consideration being given to present market quotations, p. 704.

[May 31, 1927.]

INVESTIGATION of the rates of an electric utility; new rate schedule established.

P.U.R.1928A.

Findings of Fact and Conclusions.

Milhollan, President: On December 11, 1926, the Board of Trustees of the Village of Starkweather filed with the Commission a petition in the form of a resolution, alleging that the electric light rates charged by the Northern Utilities Corporation to the village of Starkweather and the inhabitants thereof were exorbitant and unjustifiable, and requesting the Commission to institute an investigation for the purpose of determining the justice of their plea for a reduction in rates. On March 5, 1927, the Commission instituted an investigation on its own motion for the purpose of inquiring into the rates, rules, charges, and practices of the said Northern Utilities Corporation at Starkweather. After due notice to all interested parties the matter came on for hearing at Starkweather on May 18, 1927.

Appearances: Fred J. Traynor, Attorney of Devils Lake, for the village of Starkweather, H. F. O'Hare, of O'Hare, Cox & Cox, Attorneys of Bismarck, for the North Utilities Corporation.

The village of Starkweather has a population of approximately three hundred and is situated in Ramsey county, about 25 miles north of Devils Lake.

The Northern Utilities Corporation is a North Dakota corporation engaged in the manufacture and distribution of electricity for light and power, operating a number of small properties in North Dakota.

The president of the village board, testifying on behalf of the petitioners, stated that the citizens of the village had made complaint regarding the rates, which led to the filing of the petition. It was shown that the original franchise granted to the Northern Utilities Corporation, prior to the enactment of the Public Utility Law, established a commercial rate for electric light and power service to the inhabitants of the said village of Starkweather at the rate of 18 cents per kilowatt hour, with a minimum bill of $1.50 per month. The rates to the village for street lighting and power purposes was fixed at 18 cents per kilowatt hour, with a minimum bill of $20 per month. It appears that on November 26, 1919, the village board amended the franchise by increasing the rates from 20 cents per kilowatt hour to 25 cents per kilo-

watt hour, which rates have been charged and collected since that date. It should be noted that in March, 1919, the Public Utility Law (Chap. 192, Session Laws of 1919) became effective, vesting in the Board of Railroad Commissioners the power to determine and fix rates to be charged by public utilities. The law specifically provides that no change shall be made in any rates in force at the time the act takes effect, except after thirty days' notice to the Commission, and a finding by the Commission that such increase is justified. The then owners of the property did not file with the Commission either its original rates or the increased rates, though repeated efforts were made by the Commission's assistants to have all rates filed which were being charged when the Public Utility Law became effective. On February 6, 1923, the present rates were filed with the Commission and, under the statute, became effective March 6, 1923. We entertain doubt as to whether the increased rates became effective prior to March 6, 1923, since no application for authority to increase the rates was filed with the Commission as required by law. On or about July 1, 1926, all of the outstanding stock of the Northern Utilities Corporation was sold to the present owners, so that while the property is still operated under the name of the Northern Utilities Corporation it is owned and managed by parties other than the original owners.

Valuation.

The Commission caused its engineering department to make a detailed inventory and appraisal of the property, used and useful in furnishing service, and exhibits showing the result of this investigation were offered and received in evidence. Appraisals were made on two bases, the first of which was designed to show the construction cost of the property. To arrive at the construction cost, the engineer determined the date the separate classes of property were placed into service and applied prices which prevailed as of that date. The per cent condition of the property was found by him to be somewhere between 75 and 80 per cent. Upon this method the value shown by the engineer was $6,359, with a depreciated value of $4,856, exclusive of working cash capital or intangible values.

The second exhibit was designed to show reproduction cost new,

less depreciation. The same inventory was used but prices prevailing as of April 1, 1927 were applied. In other words, the engineer endeavored to find the amount that would be required to reproduce this property as of that date, as required by statute.

The reproduction cost was found to be $8,614, with a depreciated value of $6,561, exclusive of working cash capital and intangibles. In the following table are shown the items which are included in these appraisals, together with the amounts represented by the engineer as being the construction cost and the reproduction cost of this property.

	Construction Cost	Reproduction Cost	Depreciated Value
Land	none	none	none
Structures	$105	$149	$119
Generating plant	4,169	5,430	4,155
Transmission and distribution	1,363	1,858	1,389
General equipment	30	43	32
Overhead costs	680	1,122	854
Materials and supplies	12	12	12
Total	$6,359	$8,614	$6,561

[1, 2] It will be noted that there is little difference between the construction cost and the cost of reproduction less depreciation. This is probably due to the present per cent condition of the property. The attention of the engineer and the Commission was directed to the fact that there were few omissions in the inventory which, according to the record, would amount to about $125. A reasonable allowance should also be made for working cash capital and going concern value. From the accounting report before us, we have determined that the amount of $166 is reasonably required for working capital. No appraisal was submitted by the utility, nor was any specific showing made as to going concern value. Giving consideration to all of the elements of value as disclosed by the record, we are of the opinion and find that the value of the property of the Northern Utilities Corporation at Starkweather, used and useful in furnishing service, at the time of the inquiry is the sum of $6,980.

Operating Revenues and Expenses.

The Statistical Department of the Commission made an analy-

sis of the operating revenues and expenses for the nine-month period, July, 1926 to March, 1927, inclusive. An exhibit showing in detail the result of operations for this period was offered and received in evidence. The operating revenues for the nine-month period were shown to be the sum of $3,750.50; and the operating expenses for the same period were shown to be $2,346.66, leaving available for depreciation and return $1,403.84. The present management maintains a general office at Omaha, Nebraska, and a branch office at Jamestown, North Dakota, at which points the books and records are kept. The company operates several electric properties and one gas property in North Dakota, and also operates utilities in other states. Certain general office expenses are, therefore, allocated to the different properties. It is the testimony of the chief statistician of the Commission that the figures shown in his report represent the reasonable operating charges assignable to Starkweather. If we may assume that the operating revenues for the coming year will be substantially the same, or slightly more than the year previous, and the record supports this assumption, it is apparent that the present rates are developing more revenue than is necessary to provide for operating expenses, depreciation, and a reasonable return. We are of the opinion and find that the present rates are unreasonable for future application.

There is no complaint as to service, which at present is furnished all night and on Monday and Tuesday until noon. This latter arrangement is for the convenience of those who desire to use electrical appliances for washing and ironing. The service is direct current, generated locally.

There has been a rapid development of electric transmission lines in the territory adjacent to Starkweather, which has brought reduced rates to many small communities; and the present management hopes to ultimately place Starkweather on a transmission line, presumably by purchasing electricity from other companies since the Northern Utilities Corporation has no high line in the vicinity of Starkweather.

We have estimated the reasonable operating expenses for the future based upon the experience of the company in the past and giving consideration to all of the evidence before us. We estimate

that the sum of $3,100 will be required for operating expenses for twelve months, as follows:

Labor	$1,080
Fuel oil	897
Lubricants	280
Power plant expense	128
Repairs	20
Taxes and insurance	201
General expense	494
Total	$3,100

[3, 4] To the sum of $3,100 should be added an allowance for depreciation, or retirement expense, which we find to be the amount of $280 annually. Allowing a return of 8 per cent upon the value found by this Commission, which is very reasonable under the circumstances, and giving consideration to present market quotations, it will be necessary to raise through rates the sum of $3,940 in order to provide for operating expenses, depreciation and return. We have estimated the annual sales in kilowatt hours for twelve months based upon the consumption shown in the record for the 9-month period, and we are of the opinion and find that the following schedule of rates is reasonable for future application and will yield sufficient revenue to provide for operating expenses, depreciation, and a reasonable return upon a fair value of the property of the Northern Utilities Corporation in Starkweather.

First	25 K.W.H. per month	$.20
Next	75 K.W.H. per month	.18
All over	100 K.W.H. per month	.16

Minimum monthly bill—$1.50.

The above rates are net and are to be available for all consumption, including street lighting. The minimum monthly bill for street lighting shall remain as at present, $20. Should it appear that there is a demand for a cooking rate, we suggest that the company file such rate with the Commission.

The rates so established shall remain in effect until changed by further order of the Commission and shall become effective as of July 1, 1927. The Commission specifically retains jurisdiction in order to determine after a reasonable test-period the result of operations under the new schedule of rates.

An order in accordance with these findings will be entered.

P.U.R.1928A.

NEW JERSEY BOARD OF PUBLIC UTILITY COMMISSIONERS.

RE LAKEWOOD WATER COMPANY.

Valuation — Deduction of unused property — Intangibles.

1. Amounts deducted from the rate base for unused property should include not only the basic figures representing the values of the items, but also intangible allowances, p. 706.

Valuation — Jointly used property — Question of title.

2. That part of a general meter building used jointly by several companies as a shop which is used for water company purposes may be included in the rate base, although the company does not own the building, since return on that value would be sufficient to pay a reasonable rental for so much of it as is occupied by the water company, p. 706.

Valuation — Unused property — Excess land.

3. The value of land not used and useful but necessarily acquired in connection with other land needed for right of way purposes was included in the rate base of a water utility where the cost of making the land salable would almost equal the amount claimed as a deduction and where some 2½ miles of right of way had been included at a value of $1, p. 707.

Valuation — Mains — Actual records or city map.

4. An inventory of water and sewer mains made up from actual records usually consisting of field books, individual cards, or other records showing sizes, lengths, and exact locations, in the absence of conflicting evidence, was accepted in valuing the mains, although it did not check up with quantities taken by scaling the map showing the system, in view of the fact that city maps could not be depended upon to disclose the actual lengths of the mains, p. 707.

[November 28, 1927.]

REHEARING on application for approval of increased rates for water and sewer service; rate base modified without change upon final conclusion as to reasonable rates. See also P.U.R.1927E, 71.

Appearances: Harry V. Osborne for township of Lakewood; W. L. McDermott for Lakewood Water Company.

By the **Board**: Following the issuance of the decision of the Board of June 16, 1927, P.U.R.1927E, 71, approving the schedule of increased rates for water and sewer service in Lakewood, an application for rehearing was received from the township of Lakewood, alleging:

(1) That in making deductions for property not used and

useful the amounts deducted had been the basic figures representing values of the items in question and that additions for going concern values, etc., had not been also deducted.

(2) That as the water company did not own a building used jointly by the several Lakewood companies as a shop for the maintenance and repair of gas, electric, and water meters, it was not proper to include in the basis of value any amount for this building or for the proportionate cost used by the water company and that, in any case, the deduction had not been made on a proper basis.

(3) That certain lands not used or useful for the future development of the company should be eliminated from the rate base at a figure to be fixed by the Board.

At the hearing in the matter, representative of Lakewood also contended that the inventory used by the company and approved by the Board in its accepted valuation had not been correct in that it included greater lengths for certain sizes of main than were in existence, contending that the map which had been sworn to by the company's representative as being "accurate" did not disclose such total lengths of main.

[1] The matter was duly heard on September 29th and after full consideration by the Board it appears that certain contentions of counsel for Lakewood were correctly taken, namely:

(1) An additional deduction representing the intangible allowances on the excluded values for water rights of	$8,800.00
(2) An additional deduction representing the intangible allowances on that portion of the meter building which was not used by the water company, of	265.00
(3) An additional deduction representing the intangible allowances on the excluded value of pumping equipment, of ...	3,134.56
Total deductions for overhead charges will be	$12,199.56

[2] With reference to the matter of including in the basis for value any figure at all for so much of the general meter building which was used for water company purposes, attention should be called to the fact that the decision of the Board does not determine a value for purchase and sale, but is determining a basis upon which the rates could be computed. This does not assume that a portion of the meter building would be transferred to the water company but does assume that by the inclusion of

a value for a portion of the building, return on that value would be sufficient to pay a reasonable rental for so much of the building as is occupied by the water company. There are other items of property which are used more or less jointly by the electric and water companies, namely, land used for storage of coal and poles. In a similar manner, land belonging to the electric company is occupied by the water company for a store room housing pipe, fittings, hydrant repairs, etc. In the final result it would have no appreciable effect on the resulting rates.

[3] With reference to the land not used and useful, this consists principally of a piece of land which in order to obtain it at all, the company was required to purchase the whole of a tract located on the north side of Ocean avenue, with a narrow strip extending along the Central Railroad of New Jersey and used for right-of-way purposes. Testimony in the matter is quite clear that there is land in excess of that needed for the actual right-of-way, but the testimony indicates that to make this land salable for lot purposes would cost almost as much as the amount which Lakewood has claimed should be deducted because of the value of the land. It was further testified that if attempts were made to make the land salable by the construction of a street and the laying out of the land into lots, it would probably take a considerable portion of time before the lots could be sold. As an offsetting item, the company has called attention to the fact that some two and a half miles of right-of-way have been included at a value of $1. On the whole, the Board is of the opinion that the total included in the rate base for land is not excessive and no further deduction is made for certain portions not now used and useful.

[4] With regard to the claim that the final inventory used by the company, and which was the basis of the Board's conclusions as to value of mains, did not check up with quantities taken by scaling the map showing the system, this appears to depend upon the definition of the word "accurate" as applied to a map of water mains. In the Board's opinion, which is based on the general practice as evidenced by testimony of engineer Knox in this case, a map represents existence and is usually arranged to show the sizes of the particular mains and their

general location, but it is notorious that a map of a municipality cannot be depended upon to disclose the actual lengths of the mains. The inventory used by engineer Boardman for the company it is stated was made up from "actual records" which usually consist of field books, individual cards or other records which show the sizes, lengths, and exact locations in the various streets. The inventories made by the Board's engineers have in all cases been checked by such records when they were available. No testimony has been submitted in opposition to the testimony of the company's witnesses to the effect that Boardman's inventory was made from actual field records. No change will be made in the inventory which has been the basis of the Board's decision, no sufficient reason for such change having been set forth.

In checking over the testimony and exhibits in connection with this application for revision, the company has called attention to the fact that in determining the required gross revenue an amount of approximately $3,800 was omitted from the amount included for taxes on the assumption that these taxes were paid by the holding company and not by the operating company. The company's estimate as to the required gross revenue should be increased by this amount.

Conclusions.

The total value of the property for determining the rates will, therefore, be reduced by an amount of $12,199, leaving as a basis on which the rates are computed an amount of $1,087,860. This change in the rate base, it will be seen, has no effect in the final conclusions as to just and reasonable rates.

PENNSYLVANIA PUBLIC SERVICE COMMISSION.

RE MATTHEW GUERIN.

[Application Docket No. 16139.]

Monopoly and competition — Auto truck and rail service — Renewal of certificate.

1. A certificate should not be granted to a motor truck operator whose former certificate has lapsed for some time, authorizing him to engage in a general or unrestricted common carrier business in a field where established carriers, rail and auto truck, are furnishing adequate service to the public, since the public interest would not be served by the establishment of a service that would be destructively competitive, p. 709.

Certificates of convenience and necessity — Limitations — Motor truck operator.

2. A certificate may be granted authorizing a limited motor truck service rendered to a limited number of business and industrial concerns when the existence of other carrier service makes inadvisable to authorize the operator to engage in a general or unrestricted carrier business, p. 710.

[June 28, 1927.]

APPLICATION for a certificate of convenience and necessity authorizing a motor truck service; limited certificate granted.

By the **Commission:** [1] A certificate of public convenience was issued in 1923 to the applicant in this case for the operation of a motor truck service between Philadelphia, Allentown, Bethlehem, and Easton. The certificate expired by limitation on June 1, 1925. Through inadvertence, as now claimed by the applicant, a petition for renewal of the certificate at the date of its expiration was not presented to the Commission.

In March, 1927, the Lehigh Valley Transit Company filed complaint against Guerin for operating motor vehicles as a common carrier without a certificate. The complaint was sustained and in April the Commission issued an order upon Guerin to cease and desist common carriage operation, whereupon this application was filed by Guerin for a certificate. While, strictly speaking, the application is a new one, in effect it is a renewal of the certificate which Guerin formerly held, inasmuch as he has been rendering continuous common carriage service.

The Commission is not convinced that there is any necessity

for the issuance to Guerin of a certificate to engage in the general or unrestricted business of common carriage between Philadelphia, Allentown, Bethlehem, and Easton. A number of other established carriers, rail and auto truck, are furnishing adequate service to the public in that particular field. The service being rendered, for instance, by the protestant in this case, which was interrupted or disconnected for a considerable period at the time Guerin's previous certificate was in force, has been considerably increased in efficiency and adequacy. The public interest would not be served by the establishment of a service that would be destructively competitive with those of the protestant and other carriers involved. However, the record before the Commission in this case, as well as in Guerin's previous application, quite clearly establishes that the great bulk of applicant's business is a special service to four different business and industrial enterprises. The applicant in effect acts as distributor for those four concerns and relieves them of the necessity of employing their own private trucking systems.

[2] Through counsel, applicant agreed to limit operations under a certificate to conform with such conditions as are found by the Commission necessary to meet public necessity and requirement, as developed in the facts of record in this case. The Commission finds that the service being rendered by the applicant to the four business and industrial concerns set forth in the record is necessary and proper for the convenience of the public, and a certificate limited in accordance with this finding will be issued.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania, upon petition and protests, and having been duly heard and submitted and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made part hereof;

Now, to wit, June 28, 1927, it is *ordered* that a certificate

of public convenience issue evidencing the Commission's approval of the right of Matthew Guerin, to transport freight and merchandise between the city of Philadelphia and the cities of Allentown, Bethlehem, and Easton, Pennsylvania, subject to the following limitations and conditions:

First: That the rights, powers, and privileges hereby granted shall cease and terminate on June 1, 1929, unless renewal thereof is duly granted by the Commission.

Second: That in furnishing the service, said Mattew Guerin shall operate seventeen Mack International 5-ton trucks, Maker's Nos. 1033651, 1034697, 734788, 735972, 1035860, 67963, 1037097, 1038146, 1033131, 1033187, 1032972, 1032622, 10310648, 10313025, 10313238, 10313239, 518170, respectively, and one 1½-ton Federal Motors Company Truck, Maker's No. 42688, and make no change or changes in said equipment unless the approval of the Commission is first had and obtained.

Third: The rights, powers, and privileges hereby granted are limited and restricted to the transportation of merchandise from the warehouse of the Atlantic & Pacific Tea Company in Philadelphia to said company's stores in Allentown, Bethlehem, and Easton; the transportation of sugar from warehouse of Stephens & Swain in Philadelphia to their warehouse in Allentown; the transportation of meats from the slaughter house of Arbogast & Bastian in Allentown to warehouse of Wilson & Martin in Philadelphia, and the transportation of jute from the plant of the Allentown Spinning Company in Allentown to their various mills in Philadelphia. It being the intent and purpose of this condition to limit and restrict the rights and privileges of the transportation of the goods and merchandise of the Atlantic & Pacific Tea Company, Stephens & Swain, Arbogast & Bastian, and the Allentown Spinning Mill.

Fourth: That the applicant shall comply with all these provisions of the Public Service Company Law as now existing or as may hereafter be amended, and the special rules hereto attached and made a part hereof, in so far as they are applicable and such other special rules as may hereafter be prescribed by the Commission.

PENNSYLVANIA PUBLIC SERVICE COMMISSION.

TIOGA COUNTY BELL TELEPHONE COMPANY

v.

CITIZENS' MUTUAL TELEPHONE & TELEGRAPH COMPANY.

[Complaint Docket No. 7163.]

Monopoly and competition — Restrictive area agreement — Formal defects — Telephones.

1. An anticompetition agreement between two telephone companies apportioning territory for respective operation of service, although lacking legal formalities and possibly unenforceable between the parties, has evidential value for the Commission as showing the abandonment of certain rights in the specified areas by the respective utilities, p. 713.

Monopoly and competition — Jurisdiction of Commission — Anticompetition contract — Telephones.

2. Acts in abandonment of service by a telephone utility in a certain area in conformity with an anticompetition agreement and a gradual withdrawal of facilities in accordance therewith is a surrender of its rights to render service which cannot be reacquired without the approval of the Commission, p. 713.

Commission — Power over managerial question — Effect of utility's refusal of suggestion.

3. While certain economies suggested by the Commission engineer as a substitute for a proposed re-entry of a telephone utility into an area, creating a burdensome duplication of service, cannot be forced upon the company by the Commission, the fact that the unsatisfactory conditions claimed by the utility could be thus improved without creating a less satisfactory condition otherwise, may be taken into consideration where the Commission's approval or disapproval is based upon a question of public necessity p. 714.

Monopoly and competition — Duplication of telephone facilities — Former abandonment.

4. The re-establishment of a telephone office and a resumption of service was found to be contrary to public necessity where the telephone company had voluntarily abandoned its rights to maintain a central office in a community adequately served by another utility, and a discontinuance of such service was ordered, p. 715.

[October 31, 1927.]

COMPLAINT of a telephone utility against unwarranted competition in specified area; competitive service ordered discontinued.

P.U.R.1928A.

By the **Commission:** This complaint alleges in substance that respondent is establishing a telephone central office and is attaching subscribers in the borough of Tioga, Tioga county, without the approval of the Public Service Commission. Subsequent to the first hearing held on this complaint a field investigation and conference with the parties was conducted by the telephone engineer of the Commission, whose report was at a later hearing admitted into evidence.

The Farmers' Mutual Telephone Company, predecessor to complainant, and the Citizens' Mutual Telephone & Telegraph Company, respondent, both held franchises to render telephone service in Tioga county and were rendering such service on January 1, 1914. Prior to 1920 they owned and operated jointly a central office in the borough of Tioga, and separately and competitively owned and operated their outside plant facilities in that borough.

On September 1, 1920, these companies, without either one having relinquished its telegraph rights, entered into an agreement, the intent of which was to eliminate the competitive situation in each of the communities of Tioga, Mansfield, and Covington, all in Tioga county. By it respondent agreed to cease the exercise of its rights in certain territory and the Farmers' Company agreed to a similar cessation in other territory. Specifically in Tioga, respondent agreed to relinquish to the Farmers' Company the entire central office equipment and to maintain its outside plant facilities only for the service of those of its subscribers who were then connected therewith. The Farmers' Company agreed that the territory west of Cove Bridge on the Mann Hill Road line and northwest of Crooked Creek in Brooklyn should become the exclusive territory of respondent.

[1, 2] Pursuant to the provisions of this agreement, respondent turned over to the Farmers' Company the central office equipment in Tioga, ceased to accept additional subscribers in the borough of Tioga, and continued to maintain its lines only for those subscribers already connected therewith. The Farmers' Company, for its part, refrained from making extensions into the territory which it had agreed should be served by respondent. Further, the Farmers' Company, having since become the Tioga

County Bell Telephone Company, complainant in this case, in reliance both on the agreement and on the subsequent acts of both parties thereunder, made material and expensive improvements to its central office and outside plant facilities and established connections to the system of the Bell Telephone Company of Pennsylvania.

On January 30, 1927, respondent re-established a central office in Tioga with the evident intention of again entering into active competition with complainant in this territory. Thereupon complainant secured an injunction to hold matters in *statu quo* until the Commission could act.

Although the agreement of 1920 was entered into without observing all of the formalities required by law and may not be enforceable as between the parties, it has evidential value as showing that the respondent has abandoned certain rights in the borough of Tioga. The Commission finds that respondent by that agreement and its subsequent acts has surrendered its right to render service in the borough of Tioga beyond that being rendered by it after the sale of its central office equipment in 1920, and in accordance with the policy of gradual removal of its facilities as outlined in the agreement. To reacquire this right certain procedure including the securing of the approval of the Public Service Commission, is necessary.

[3] Although no application has been made to the Commission for approval of the acquisition of the rights previously abandoned, the respondent attempted to show the advantage which its subscribers would secure through the resumption of those rights by it. It stated that the establishment of its central office would effect the elimination of certain costs and a discriminatory toll condition and would produce a saving to its subscribers. It also attempted to show that the service rendered by the complainant was unsatisfactory.

The report of the Commission's engineer which was offered in evidence suggested certain practices which would effect the result desired by respondent without introducing competition into this small community. The respondent, however, stressed the fact that the Commission cannot force it to act on these suggestions. The Commission recognizes that many details in-

cident to operation are within the sole control of the utility's management, and therefore, although the Commission will not order the respondent to carry out these suggestions, the fact that unsatisfactory conditions can be improved, without creating a less satisfactory condition otherwise, would be taken into consideration were the present complaint to be decided on the administrative question of public necessity rather than upon the legal question as to the rights of the parties.

[4] Duplicate telephone facilities of separate companies have been recognized both by this Commission and by the courts as being undesirable. (Perry County Teleph. & Teleg. Co. v. Public Service Commission, 265 Pa. 274, 108 Atl. 659.) This is especially true in communities the size of that involved in the present complaint. Undoubtedly service by one company in that community could be furnished with less burden upon the public and with greater accommodation than can service by two competing companies having no physical connection between their lines. Respondent's former management apparently reached and acted upon this conclusion in 1920. Although respondent now offers service in the community at somewhat less than the rates charged by complainant, the service rendered by it is inferior to that of the complainant in both quality and availability. The Commission is convinced that no public advantage would accrue from the re-entry of respondent into active competition with complainant in this community. The entire abandonment of respondent's service in accordance with the surrender of its rights will best serve the interests of the public.

Having found that the respondent company abandoned its right to maintain a central office and serve any persons other than those being served by it in 1920, and no approval of this Commission to the acquisition of any additional rights having been secured, the respondent company will be directed to discontinue the central office service in the borough of Tioga and to cease and desist from rendering any service in that borough to persons not served by it immediately prior to the installation of its central office.

WISCONSIN RAILROAD COMMISSION.

RE RULES AND REGULATIONS GOVERNING ELECTRIC LINES.

[U-2776.]

Service — Electricity — Rules and regulations.

Revised rules and regulations governing the construction, operation, and maintenance of lines and equipment owned, managed, operated, or controlled by public utilities for the transmission of electricity were adopted.

[August 3, 1927.]

INVESTIGATION of rules and regulations governing electric wires and equipment; revised rules and regulations established.

By the **Commission:** *Whereas,* An investigation has been conducted by the engineering department of the Railroad Commission jointly with the Industrial Commission, involving the revision of the standards of safe electrical construction and operation, and

Whereas, All railroads and public utilities under the jurisdiction of this Commission and subject to the requirements of § 1797m–102o of the Statutes have had proper and reasonable notice of the hearing held in connection with the aforesaid investigation, and

Whereas, As a result of such hearing and investigation certain changes in, and additions to, the Wisconsin State Electrical Code have been adopted and promulgated by the Industrial Commission of Wisconsin as their General Orders Nos. 1000 to 1499, inclusive, effective September 12, 1924;

It is therefore *ordered,* that all railroads and public utilities subject to the jurisdiction of this Commission and subject to the requirements of § 1797m–102o be, and they are hereby, required to observe and conform to the standards of construction, maintenance, and rules of operation as established by the Wisconsin State Electrical Code adopted by the Industrial Commission, copy of which is hereto attached.

The Railroad Commission amends General Safety Orders 1312-b, 1340-c, 1350-h, 1352-b-2 1352-b-6, 1354-b-1, 1375-b-3,

and adopted a new General Safety Order to be numbered 1347, all of which orders are a part of the orders collectively known as the Wisconsin State Electrical Code. Such orders to read as follows:

Order 1312 (b).

Devices and apparatus which tend to create sparks or arcs and thus ignite highly inflammable materials shall not be placed in extra hazardous locations unless such devices and apparatus are of the totally inclosed type, especially approved for the location.

Order 1340 (c)—Twin Wires.

Twin wires shall not be used except in conduits, armored cable, metal raceways, approved nonmetallic sheathed cable, or flexible cords.

Order 1347—Nonmetallic Sheathed Cable.

Definition: Nonmetallic sheathed cable designates an approved assembly of copper conductors having rubber insulation and protective coverings consisting of helically wound paper tape and cotton braid. Individual conductors are inclosed within the outer braid saturated with moisture resisting and flame retarding compound.

Where cable is mentioned in this order, the above described nonmetallic sheathed cable will be understood.

(a) Cable shall not be used for circuits exceeding 300 volts between conductors.

(b) Cable shall not be used except for all circuits in residence occupancies, and in out-buildings on the same premises where other types of wiring are not required by this code.

(c) Cable shall be of approved types and of 2 and 3 conductor assemblies in sizes Nos. 13 to 6, inclusive.

(d) Cable may be used in exposed wiring work under the following conditions:

1. Mounted directly upon surfaces of woodwork, plaster, cement, brick, or other building finish.

2. Secured between outlets with approved fastenings spaced at intervals not exceeding four feet.

3. Used only in dry places, and in no place run along the wall nearer than 6 inches above the floor.

4. Protected within 8 feet of floor by wood or metal protecting strip placed over the cable and securely fastened in place.

(e) Cable may be used in concealed wiring work under the following conditions:

1. Only in dry places; in wood joists or stud partitions, floors, and walls.

2. When secured between outlets by approved fastenings spaced at intervals not exceeding four feet or by other practicable means which will provide for the entire installation being securely fastened in place.

3. Where it is impracticable in concealed wiring to provide the supports specified in the preceding paragraph, runs may be fished between the outlet box or plates.

(f) Cable shall be run without joints, splices, or taps from outlet box to outlet box (or junction boxes or plates) and shall be provided with approved outlet (or junction) boxes or plates at each outlet, into which the cable shall be run and to which it shall be rigidly fastened by means of approved fittings, which completely close the opening. If cable enters boxes from the side in concealed work, boxes of 1½-inch depth are required.

(g) All bends shall be so made and other handling shall be such that the nonmetallic covering of the cable will not be injured.

(h) Cable shall not be buried in plaster, cement, or similar finish.

(i) When cable is installed in conduit, the provisions of Orders 1331 and 1342 shall apply as far as practicable.

(j) When in exposed or in concealed wiring, cable is run through holes in studs, joists, or similar wood members, the holes shall be located at the approximate center of studs and not less than 2 inches from the nearest edge of joists or other members whose depth permits this spacing.

(k) In attics and roof spaces where within five feet above floor or joists, the cable shall be considered as exposed to mechanical injury, and shall be protected by suitable wood or metal

strips securely fastened in place. Cable shall not be used across top of joists in unfinished attics or roof spaces, nor in similar locations.

(l) Cable in basements, if used in other than concealed work, shall be run on under side of running board, not less than $\frac{1}{8}$-inch by 2 inches, or on side of floor joists or timbers.

Order 1350 (h)—Guarding Live Parts of Switches. (See also Orders 1310, 1351-d and 1354).

All manual switches, including service entrance switches, shall have suitable casings or inclosures of such design as to permit of operation without opening the inclosure and so that the operator is at all times protected against danger. Cases shall be locked, sealed, or made inaccessible, to other than qualified persons, by other suitable methods.

(Exception: Switches on switchboards and panelboards which are guarded as required by Order 1310, are exempted from this order. The panelboards which have no live parts of switches, fuses, or other equipment exposed at any time when operating the switches or changing fuses, need not be installed in locked cabinets. Single-pole, three-way and four-way switches for use in two-wire branch circuits are not included under this order.)

Order 1352 (b) (2).

On a two-wire branch circuit and on either side of a three-wire branch circuit the number of outlets (see definition 3 order 1020) shall not exceed 12.

Exception: (1) In cove lighting, outline lighting, foot lighting, proscenium side lighting, marquees, and canopies, 24 outlets will be allowed providing not larger than 15-ampere fuses are used.

(2) For sign lighting, there will be no definite limit as to the number of sockets, but the fuses must not be larger than 15 amperes. A sign shall be understood to be an assembly of letters, words or symbols within or upon which are mounted receptacles or sockets for lamps to electrically illuminate such symbols, the whole assembly to be operated as a single unit.

Order 1352 (b) (6).

Each motor shall be supplied by a separate branch circuit protected in accordance with (a) above.

Exception: Motors may be grouped under the protection of a single set of branch circuit fuses provided the rated capacity of the fuses does not exceed 15 amperes.

Order 1354 (b) (1)—Panelboards.

Panelboards and cut-out bases for lighting distribution centers shall be enclosed in metal cabinets and the combination of cabinet and enclosed device shall be of such design as to be deadfront. A device is considered to be dead front if it is so designed as to allow the replacement of fuses and the operation of switches without the possibility of unqualified persons coming in contact with live parts.

Order 1375 (b) (3).

Foot lights of metallic trough construction may be wired with rubber covered or varnished cambric insulated wire except that where the construction and arrangement is such that the temperature inside of the trough approximates 120 degrees Fahrenheit only slow burning wires shall be used. For wiring of borders and proscenium side lights, wire with slow burning insulation shall be used.

It is *further ordered,* that all railroads and public utilities subject to the jurisdiction of this Commission, be, and are hereby, required to submit to this Commission full information regarding the construction and location (with map) of all lines to be built in the future and described as follows:

Electric supply lines, of a voltage of nominally 2300 volts, or over between a phase wire and ground or between phase wires.

Electric supply lines, the voltage of which is raised, and when this increase in voltage requires a change in the separation of the wires and clearance, between wires and ground or rails at railroad crossings.

Signal lines, where the construction will produce conflicts (not crossings) between these lines and supply line already constructed.

Exceptions: Lines which are a part of a distribution system

within the corporate limits of a city or village, or in communities with similar density of population, are exempted from this order.

This order amends and adds to the orders of this Commission with reference to standards for the safe construction and operation of electric systems, decided September 12, 1922, and other orders issued subsequent thereto.

WISCONSIN RAILROAD COMMISSION.

STANGE LUMBER COMPANY

v.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

[R-3452.]

Interstate commerce — Jurisdiction of state over spur tracks extending from end of existing main line.

1. Spur track construction extending from the end of an existing main line is not an extension of the main line within the purview of the spur track law giving the Interstate Commerce Commission (Par. 21, Interstate Commerce Act) jurisdiction over such construction and is, therefore, within the jurisdiction of the State Commission, p. 722.

Certificate of convenience and necessity — Extension of spur track from existing main line.

2. The application for a spur track extending from the end of an existing main line is not an evasion of the statutes requiring a certificate of convenience as a condition precedent to the construction of an extension of main line, p. 722.

Service — Railroads — Spur track construction — Statutory requirements.

3. The fact that a spur track applied for has already been built by the applicant does not preclude the operation of a statute because of a requirement that the railroad "construct, connect, maintain, and operate" the same; since the carrier may reconstruct at the industry's expense if the track is not found to be standard, p. 723.

[October 28, 1927.]

PETITION for order for construction of a spur track; order issued.

By the **Commission**: On August 30, 1927, the Stange Lum-

ber Company of Merrill, Wisconsin, filed with the Railroad Commission a petition requesting an order for the construction of a spur track 2.9 miles in length, extending in a northerly direction from Knudson, the present terminus of a branch line of the Chicago, Milwaukee & St. Paul Railway Company in Vilas county.

A hearing was held at Madison on September 30, 1927, Olin & Butler by Harry L. Butler appeared for the applicant, and the respondent was represented by J. N. Davis and John B. Sanborn.

The testimony introduced by the petitioner shows that the proposed spur track does not necessarily exceed three miles in length, is practically indispensable to the successful operation of the petitioner's lumber industry, and that its construction and operation will not be usually unsafe and dangerous, nor unreasonably harmful to the public interest. No testimony was introduced by the respondent in refutation of the petitioner's testimony with respect to these facts.

The branch line of the respondent extending northward from Star Lake to Knudson was originally built by the petitioner and later taken over and operated by the respondent. The petitioner has constructed a track on the right of way in question beyond Knudson and desires the railroad company now to take over this portion of the track as a spur track. The petitioner also has other private logging railroads extending beyond to its various camps in connection with its logging operations.

[**1, 2**] The respondent contends that the spur track which the petitioner seeks to have respondent take over and operate is in fact an extension of the main line and that under the transportation act of 1920, such extensions are within the jurisdiction of the Interstate Commerce Commission and the Railroad Commission of Wisconsin is without jurisdiction with respect thereto.

In Menasha Woodenware Co. v. Railroad Commission, 167 Wis. 19, P.U.R.1918C, 294, 166 N. W. 435, this contention was squarely passed upon by the supreme court of Wisconsin, which held that a spur track could be constructed extending from the end of an existing main line within the purview of the spur track law, and that such a track is not an extension of the main

line. In that case, it was contended that the application for the spur track was made for the purpose of circumventing the statute, which requires the Commission to grant a certificate of convenience and necessity as a condition precedent to the construction of an extension of main line, in that subsequent applications of a similar nature could be made, resulting in a total extension in excess of the minimum fixed for spur tracks. In spite of this contention, the supreme court held that such a track is not an extension of the main line and that the Commission has no option but to grant a request for a spur track where the statutory conditions enumerated by § 195.16 are met. Moreover, the jurisdiction of the state in connection with the construction or abandonment of spur tracks is specifically reserved by the provision that the authority conferred upon the Interstate Commerce Commission by Paragraphs 18 to 22 "shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks located or to be located wholly within one state." (Paragraph 21, Interstate Commerce Act.)

[3] The respondent contends that the application does not fall within the statute because the track has already been built by the applicant, whereas the statute provides that the railroad shall construct, connect, maintain, and operate the track. If the track as built does not conform to reasonable standards for such tracks it is within the respondent's province to repair or reconstruct it so as to conform to such standards at the applicant's expense. But to insist that where a suitable track is already in place and available for use, a new track must be built at the industry's expense to conform to the technical wording of the statute would be little short of absurd. Certainly such new construction cost would be wasteful and would not be "legitimate" within the meaning of the statute which requires the Commission to determine the legitimate cost of the track as a condition precedent to the right of the railroad to demand payment from the industry.

In view of the decision of the supreme court in Menasha Woodenware Co. v. Railroad Commission, *supra,* the Commission is of the opinion that since the testimony justifies a finding

that the statutory conditions have been met, the Commission has no option but to order the operation of the track as a spur track.

The Commission finds that the proposed spur track extending north of Knudson will not necessarily exceed three miles in length, is practically indispensable to the successful operation of petitioner's industry and that its construction and operation will not be usually unsafe or dangerous, nor unreasonably harmful to the public interest.

Jurisdiction is retained for the purpose of determining the legitimate costs to be paid by the applicant upon the completion of the track repairs, if any, and any other collateral matters which may arise.

ALABAMA SUPREME COURT.

E. B. COMPTON
v.
ALABAMA POWER COMPANY.

[7 Div. 686.]

(— Ala. —, 114 So. 46.)

Service — Contract for electric installation — Breach of duty — Damages.

1. A contract for service between a consumer and an electric utility is not the basis of an action by the former for the damages caused by fire resulting from defective installation, but only the inducement to show the creation of the relation of the authority out of which the alleged breach of duty arose, p. 728.

Contract — Materiality in damage suit — Electric utility.

2. The statute of frauds is not a valid defense in a negligence suit where the contract, alleged not to be performed in a year, is immaterial to the liability of plaintiff, p. 728.

Appeal and review — Statute of fraud — Installation contract — Overruled demurrer.

3. Overruling a demurrer to a plea of the statute of frauds improperly interposed as a defense to a suit for damages resulting from a fire caused by defective wiring is a prejudicial error where it results in keeping out of evidence an installation contract necessary as an inducement to show the relationship of the parties creating the duty alleged to have been breached, p. 729.

Constitutional law — Delegation of quasi legislative powers — Commission.

4. The delegation of a quasi legislative power to the Public Service Commission to make minor rules and rules necessary or appropriate for the administration of the general laws of the state is not a violation of the constitutional prerogative of the legislature, p. 730.

Commission — Power to limit liability for electric service — Rule.

5. A rule releasing an electric utility from responsibility for the condition of consumers' equipment in its service is an attempt to limit the liability of a utility clearly beyond any grant of power to the Commission, p. 731.

Commission — Power over legal questions relating to contract — Electricity.

6. A rule of the Commission providing that no statement of a utility employee shall bind the company, unless in writing and approved by an official thereof, is an attempt to deal with substantive law and clearly beyond any grant of power to the Commission, p. 731.

Appeal and review — Grounds for reversal — Commission rules regulating electricity.

7. An exception to the ruling of the trial court, admitting into evidence rules of the Commission regulating electric service, some of which were unauthorized and the balance of which were irrelevant, was well taken and the ruling reversed on appeal from a suit against an electric utility for damages from fire resulting from defective wiring, p. 731.

[October 13, 1927.]

SUIT for damages from fire resulting from alleged defective wiring against an electric utility; appeal from judgment in favor of the defendant reversed and remanded.

Statement by **Somerville, J.**:

The suit is for damages for the loss of plaintiff's home and furniture by fire, which resulted, as alleged, from defectively equipped service wires installed by defendant for lighting and heating purposes.

The case was tried on count 3 of the complaint, which after stating the nature of defendant's business as a public utility, and plaintiff's ownership of the property destroyed, alleges:

"That on or about, to wit, said 1st day of November, 1923, the defendant entered into an agreement with the plaintiff by the terms of which defendant agreed to properly install in plaintiff's said residence, . . . an electric stove, electric switches, fuses, and wires, and further agreed with plaintiff that defend-

ant would properly maintain said stove, switches, fuses, and wires, and by the terms of which plaintiff agreed to pay defendant (therefor); and plaintiff further avers that in pursuance of said agreement defendant did install said stoves, switches, fuses, and wires in about November, 1923, and maintained same . . . up to and on said 1st day of May, 1924, and plaintiff paid defendant such sums as were charged by it (for said service); and . . . that on said 1st day of May, 1924, he was a customer of the defendant, and defendant was furnishing to him electricity for his said home for illumination and heating and other domestic purposes, . . . by means of certain feed or cut-in wires leading from its transmission lines to said switches. . . ."

With respect to defendant's breach of duty in the premises, it is alleged that:

"Defendant owed to plaintiff the duty to supply electricity to his said house of a voltage that was reasonably safe and only such as was reasonably safe and was necessary to light his said home and for said other purposes; and plaintiff further avers that defendant was guilty of negligence in and about the installing and maintenance of said stove, switches, fuses, and wires, and that as a proximate result of defendant's said negligence, the electric wires in plaintiff's house on said 1st day of May, 1924, became heavily and dangerously charged with electric current and ignited and set plaintiff's house and furniture on fire, burning . . . and completely destroying same, all to plaintiff's damage in said sum of $10,000."

Besides the general issue, defendant pleaded several special pleas, to all of which demurrers were sustained excepting pleas 6 and 7, which are as follows:

"(6) That the alleged agreement with plaintiff that defendant would maintain said stove, switches, fuses, and wires was a verbal agreement, which by its terms was not to be performed within one year from the date of said agreement, which said agreement was void under the statute of frauds.

"(7) That the alleged cause of action as set out in said counts is barred by the statute of limitations of one year."

Numerous grounds of demurrer were filed to these pleas, of which only the following need be stated:

"(17) It appears that the defendant entered upon and discharged a part of its said obligation within one year and received pay therefor and cannot now plead the statute of frauds.

"(18) It does not appear that the cause of action declared in counts 3 and 4 was barred when this cause was instituted.

"(19) The count to which the said plea is addressed affirmatively shows that the cause of action was not barred by the statute of limitations of one year."

The demurrers being overruled, issue was joined on the pleas, and the trial resulted in a verdict for defendant.

Plaintiff's evidence tended to show that the fire was caused by a burning wire in the upper part of the house, and the chief issue of fact was whether the service wires were properly protected against short circuits by properly placed fuses carrying a properly limited amperage. On this subject plaintiff's expert witness Ellis testified:

"That, if the insulation on a wire caught on fire from the wire, this would indicate a short circuit somewhere in the wire, and that there was no way in installing a wiring system to prevent having a short circuit, and that, so far as he knew, there was no way to eliminate a short circuit, and that, if a wire was overfused, and you got a short circuit in the wire, it would be likely to set a house on fire, and that they put fuses on the wire to protect against a fire which might be caused in this way."

Defendant's witness McBrier, a local employee who sold the electrical stove to plaintiff, and had it installed, testified:

"That the fusing system is the principal protection against fire, and that the witness did not find out what kind of fuses were used on the Compton job, and that the witness went there to inspect them for the power company; that it was his duty as an employee of the power company to inspect them."

The defendant offered in evidence 22 rules adopted and promulgated by the Alabama Public Service Commission.

Rule 17 is:

"The company in accepting the application of the consumer and in supplying energy does not assume any obligation or responsibility as to the condition of the consumer's equipment or apparatus."

Rule 21 is:

"It is understood that no statement or representation of any employee or officer of the company shall bind the company unless the same be in writing and approved by the signature of an officer of the company, and that no employee or officer of the company is authorized to waive this condition."

Plaintiff "objected to each of said rules so offered in evidence, separately and severally," on numerous grounds, and, as the bill of exceptions recites:

"The court overruled plaintiff's objection to all of these rules and plaintiff excepted to the ruling. The rules were admitted in evidence and plaintiff moved to exclude them on the same grounds. The court overruled the motion and plaintiff excepted."

Plaintiff's evidence showed that, when the electrical stove was bought from defendant's agent McBrier, he agreed to install and maintain it free of cost until it was paid for; and the evidence showed that it had been fully paid for according to the contract of purchase.

Other matters are sufficiently stated in the opinion. From a verdict and judgment for defendant, plaintiff appeals.

Appearances: Harrison & Stringer, of Talladega, for appellant; Martin, Thompson, Foster & Turner, of Birmingham, for appellee.

Somerville, J.: [1] This action is not for the breach of a contract, but for the breach of a duty owed by defendant to plaintiff. The contract alleged in the complaint is a matter of inducement only. Its office is to show a relationship between the parties out of which the duty in question arose. Mobile Life Insurance Co. v. Randall, 74 Ala. 170, 178.

[2] The negligence charged is with respect to acts already done, and it is immaterial whether or not the contract contemplated their performance within a year, or whether for any other reason the contract would have been unenforceable as an executory agreement. Hence the plea of the statute of frauds is not a valid defense to the action, and the seventeenth ground of the demurrer to the plea was apt and should have been sustained.

P.U.R.1928A.

[3] It is, however, insisted for the defendant that the overruling of the demurrer to this plea was error without injury, because the case was tried and determined solely upon the issue of negligence *vel non* on the part of the defendant in the installation of the electrical stove, and in the wiring and fusing incidental thereto. This view cannot be sustained.

After stating that the first plea was the general issue, and explaining its effect, the trial judge added:

"So in this case the burden is on the plaintiff to reasonably satisfy you from this evidence that the defendant company was negligent under the rule that I have given you and as a proximate consequence of that negligence this damage resulted. . . . That is the main issue submitted to you in this case."

Then this further instruction was added:

"The other plea of the defendant is that this contract that was entered into . . . was not to be performed within a year from the date of its execution, which is August 18, 1923. Under the law in this state, . . . if a contract is entered into that is not to be performed within a year, [it] is not a good contract unless it is in writing; in other words, if it cannot be performed within the year, then it must be in writing to be a good contract. If that is not proved, then it is in the teeth of the statute of frauds as we call it. So, applying that principle of law in this case, under that plea you would consider whether or not this alleged contract was to be performed within a year from the date of its execution, August 18, 1923. If it was not to be performed under the terms of the contract within the year, then the defendant company would not be bound by that verbal contract."

At defendant's request the jury were instructed:

"That, if the alleged agreement . . . to maintain the stove in plaintiff's house was not to be completed within twelve months from August 18, 1923, then such alleged agreement was void, and the defendant would not be bound thereby."

The plea in question was interposed as a bar to plaintiff's right of action. The instructions given to the jury by the trial judge *ex mero motu*, and also at defendant's request, show that the plea was not abandoned or disregarded, but was, on the contrary,

submitted to the jury as a defense, which, if affirmatively found, would avoid the cause of action. We are, therefore, unable to hold that the retention of the plea was error without injury.

[4] The Public Service Commission is authorized to make "such minor rules and regulations as are necessary or appropriate for the administration and enforcement of the general laws of the state," and the delegation of this quasi legislative power to administrative boards is not a violation of the constitutional prerogative of the legislature. Parke v. Bradley, 204 Ala. 455, 458, 86 So. 28; 12 R. C. L. 1265, § 3. As said by the supreme court of Indiana, the true test and distinction whether a power is strictly legislative, or whether it is administrative, and merely relates to the execution of the statute law, " 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law.' The first cannot be done. To the latter, no valid objection can be made." Blue v. Beach, 155 Ind. 121, 56 N. E. 89, 50 L.R.A. 64, 72, 80 Am. St. Rep. 195, 210; United States v. Grimaud, 220 U. S. 506, 517, 55 L. ed. 563, 31 Sup. Ct. Rep. 480.

This subject was very fully and ably discussed by Mr. Justice Whitfield in State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 969, 32 L.R.A.(N.S.) 639. With respect to its constitutional aspects he said:

"The legislature may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law, complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose. . . . [Such authority] is not an exclusively legislative power."

Our statute (Code, § 9741) declares:

"The [Public Service] Commission shall have general and exclusive power to regulate and supervise every utility in respect to its rates and service regulations, and in respect to its franchis-

es, licenses, and contracts in so far as they affect its rates and service regulations."

[5–7] Some of the 22 rules of the Commission, notably 17 and 21, deal with matters of liability, and prescribe rules of substantive law, that are clearly beyond the purview of administrative authority, and are not authorized by any grant of power to the Commission, express or implied. As to the other rules admitted in evidence, conceding their validity, we are unable to see any legitimate field for their operation in this case. We think they are irrelevant and without any proper influence upon the question of the defendant's liability *vel non* for the negligence charged in the complaint. It results that plaintiff's exception to the single ruling of the trial court, admitting all of these rules in evidence, was well taken and should have been sustained.

For the errors noted, the judgment will be reversed, and the cause remanded for another trial.

Reversed and remanded.

Anderson, C. J., and Thomas and Brown, JJ., concur.

KENTUCKY COURT OF APPEALS.

CARL COOPER et al.

v.

McWILLIAMS & ROBINSON et al.

(— Ky. —, 298 S. W. 961.)

Certificates of convenience and necessity — Power of motor vehicle commissioner.

1. The commissioner of motor vehicles must find that there exists both public "necessity" and public "convenience" to authorize the granting of a certificate to operate over a line where bus service has already been legally established, p. 734.

Injunction — Effect of unwarranted petition upon other remedies.

2. The fact that a litigant has asked for an injunction to which he is plainly not entitled cannot operate to deprive him of other remedies which he is authorized to receive under the law, p. 734.

P.U.R.1928A.

Appeal and review — Grounds for reversal and remandment — Convenience and necessity.

3. The lower court should set aside, without remanding for further proceedings, an order, decision, and award by the motor transportation commissioner of a certificate of convenience and necessity granted to a bus operator over a route already served, under the erroneous impression that it was his duty to grant the same on a finding of "public convenience" requiring such service regardless of the "necessity" therefor, p. 734.

Injunction — Operating under a protested certificate — Busses.

4. There is no provision of law to warrant the issuance of an injunction restraining, pending an appeal, the operation of motor carrier under a certificate of convenience and necessity, which has been protested, p. 734.

[October 11, 1927.]

APPEAL from Circuit County Court affirming order of Commissioner of motor transportation granting an application for a certificate of convenience and necessity to operate a bus route; judgment of lower court reversed, order of commissioner set aside and case remanded to lower court for proceedings consistent with the opinion herein.

Appearances: Frank L. Ripy, of Lawrenceburg, for appellants; Bradley & Bradley, of Georgetown, and Guy A. Huguelet, of Lexington, for appellees.

Logan, J.: Carl Cooper is engaged in business under the assumed name of Cooper Bus Lines, and operates a bus line between Lawrenceburg and Lexington. Orvill Cooper is engaged in business under the assumed name of Lawrenceburg and Lexington Bus Line, and he also operates a bus line between Lawrenceburg and Lexington. George McWilliams and Jerome Robinson are engaged in business under the firm name of McWilliams and Robinson. Griffin Kelly is the commissioner of motor transportation for the Commonwealth of Kentucky.

A certificate of public necessity and convenience for bus line service was issued by Kelly to Carl Cooper, authorizing Cooper to operate busses between Lawrenceburg and Lexington. Thereafter Carl Cooper transferred or assigned to Orvill Cooper the right to operate one-half of the schedules as fixed by Kelly for the government of the bus line operated by Carl Cooper. This assignment was approved by Kelly. Thereafter Carl Cooper

operated his busses on one half of the fixed schedules, and Orvill Cooper operated his busses on the other half of the schedules.

Matters thus continued until September, 1926, when McWilliams & Robinson gave notice that they would make application to Kelly, in his official capacity, for a certificate of public convenience and necessity, authorizing them to operate a bus line between Lawrenceburg and Lexington. Carl Cooper appeared and protested against the granting of the certificate, and undertook to show to the commissioner, by his affidavit and the affidavits of others, that the Coopers were operating a bus line between the towns mentioned, which was already sufficient for the necessity and convenience of all persons seeking transportation between the two towns. He also agreed at the hearing that, if any additional service was found necessary by the commissioner, he was willing and able to furnish such additional service to the traveling public. McWilliams & Robinson offered evidence in the nature of affidavits showing that there was a public necessity for additional bus service, and that additional bus service would be a convenience between the two points. Kelly, in his official capacity, made a finding of law and facts, after having made an "outside" investigation, which we understand to mean an investigation on his own part, separate from the facts developed at the hearing. He found that the Coopers were giving satisfactory and adequate service on the schedules on which they were at the time of the application operating, but, in his opinion, the proof offered by McWilliams & Robinson showed that the privilege sought by them was convenient for the traveling public. His finding of facts was that it would be a convenience to the traveling public if the applicants should be allowed to operate a bus line between the two cities, but he did not find such operation to be a public necessity. His findings on questions of law show that he so construed the law as to authorize him to grant a certificate to operate a bus line, where one was already authorized, if it was either necessary or convenient. He was of the opinion that it was his duty to grant the certificate if it was both necessary and convenient, or, if it was *only* convenient, still it was his duty to grant the certificate, whether or not he found that public necessity demanded it.

[1] His decision on this question was prior to the decision of this court in the case of Red Star Transp. Co. v. Red Dot Coach Lines, 220 Ky. 424, P.U.R.1927E, 338, 295 S. W. 419. In that case this court held there must exist a public necessity *and* convenience to authorize the commissioner to grant a certificate to operate over a line where bus service had been legally established. The Coopers filed their petition and appeal in the Franklin circuit court, as is provided by the law governing such matters. Upon a hearing in the Franklin circuit court their petition was dismissed, and the action of the commissioner was confirmed. The judgment of the court is not in conformity with the opinion of this court in the case above cited, and for that reason must be reversed.

[2] It is argued that appellants sought an injunction to which they were not entitled. That is true, but a litigant should not be deprived of that to which he is entitled, because he asks for more than he is authorized to receive under the law. The lower court passed on the appeal, and confirmed the acts of the commissioner.

[3, 4] It is further argued that, if it should be held that the commissioner acted improperly in awarding the certificate, in that he granted it because, under his construction of the law, it was his duty to do so, if additional services were required as a matter of convenience, the lower court should be directed to remand the matter to the commissioner for further proceedings. That would be proper, if it should appear that the commissioner had failed to consider all matters proper for consideration in relation to the question; but the findings of the commissioner show that he granted the certificate because, in his opinion, it was his duty to do so, whether he found that public necessity required it or not. The judgment of the lower court should set aside the order, decision, and award of the commissioner. The lower court ruled properly in refusing to grant an injunction, as there seems to be no provision of law authorizing an injunction in such proceedings.

Judgment is reversed, and cause remanded, for proceedings consistent with this opinion.

P.U.R.1928A.

NEW JERSEY COURT OF CHANCERY.

TOWN OF HARRISON
v.
UNITED NEW JERSEY RAILROAD & CANAL COMPANY et al.

(— N. J. Eq. —, 139 Atl. 46.)

Crossings — Exclusive jurisdiction of Commission — Establishment of grade crossings.

The Public Utility Commission has exclusive jurisdiction to grant permission for railroad grade crossings over streets and highways and to regulate the same. All previous powers delegated to cities and towns in this respect are superseded.

[October 19, 1927.]

Headnote by the COURT.

SUIT by a town for an injunction to restrain the establishment of a crossing at grade by the defendant who asks counter-injunction; plaintiff's bill dismissed and injunction of defendant made permanent.

Appearances: Frederick T. Gassert, of Harrison, and Andrew Van Blarcom, of Newark, for complainant: Wall, Haight, Carey & Hartpence, of Jersey City, for defendants.

Backes, Vice Chancellor: The Board of Public Utility Commissioners granted the defendant railroad the right to lay a freight track across South Fourth street in the town of Harrison, a spur to the works of the Public Service Company. The town filed a bill to restrain the construction, and upon motion for an injunction *pendente lite* this memorandum was filed:

"Under § 21 of the Public Utilities Act, the Commission has exclusive jurisdiction of the location of railroads over the highways of the state. Previous delegation by the state of power to regulate granted to municipalities or other state agencies is superseded and abrogated by the act. In Perth Amboy v. Public Utility Comrs. 98 N. J. L. 106, 118 Atl. 782, it was held that municipal consent was not a condition precedent to the judgment of the Utility Commission. Municipal concurrence is not a condition precedent to the execution of that judgment. United New

Jersey R. & Canal Co. v. Board of Chosen Freeholders of Hudson County, 89 N. J. Eq. 95, 104 Atl. 98, is not an authority to the contrary. Injunction denied."

Thereupon the railroad filed a counterclaim to enjoin police interference by the town, and the cause is on final hearing on the case made by the pleadings, there being no disputed questions of fact. The town's claim is that its consent is necessary, in concurrence with that of the Public Utility Commission, before the spur can be laid. The views stated in the memorandum are adhered to, but amplified. The control of highways of the state is in the legislature by virtue of its sovereign power, and their devotion to general public use cannot be diverted except by its consent, directly or through agencies to which it may delegate the power. By § 27 of the Railroad Act of 1903 (3 C. S. 1910, p. 4232), the legislature delegated to the governing bodies of cities and towns through which railroads pass the authority to consent to grade crossings. Later, in 1911, the legislature created the Board of Public Utility Commissioners to "have general supervision and regulation of, jurisdiction and control over, all public utilities, and also over their property, property rights, equipment facilities and franchises" (§ 15), so far as may be necessary for the purpose of carrying out the provisions of the act (2 C. S. C. S. 1911–1924, pp. 2878, 2880). The act particularizes the powers of the Board, and, among others, by § 21 (2 Comp. St. Supp. 1911–1924, p. 2888), authorizes that body to grant to railroads the right to cross public highways at grade. The legislative scheme, creating the Utility Commission as an institution in our governmental system, and conferring upon it sovereign supervision and control over railroads, clearly comprehends exclusive jurisdiction over the manner in which such railroads may cross public highways of the state. Section 21 substitutes that body for cities and towns theretofore exercising the power to make the determination and supersedes the method of regulation provided for by the Railroad Act. It would be entirely out of harmony with the scheme if cities and towns retained the power to nullify the judgment of the Board. This view of the effect of the Utility Act was entertained by the supreme court in Atlantic City R. Co. v. Pleasant-

ville, 99 N. J. L. 328, 124 Atl. 357, affirmed, 100 N. J. L. 394, 126 Atl. 923, a case involving the violation of a town ordinance regulating the speed of trains through the town, the court being of the opinion that the right to regulate is now vested in the Commission. In Perth Amboy v. Public Utility Comrs. 98 N. J. L. 106, 118 Atl. 782, it was sought to set aside an order of the Commission granting permission for a railroad grade crossing over a public street on the ground that the city had not consented, and it was held that the consent was not necessary as a condition precedent to the exercise of the power by the Board, meaning, obviously, that the consent was not necessary either to the exercise of the power or the enjoyment of the permission. Hudson County v. Central R. Co. 68 N. J. Eq. 500, 59 Atl. 303, and United New Jersey R. & Canal Co. v. Board of Chosen Freeholders of Hudson County, 89 N. J. Eq. 95, 104 Atl. 98, relied upon by the complainant, are not in conflict. The earlier case was decided before the Utility Act came into being, and in the latter the statement by Vice Chancellor Griffin, that the municipal consent was necessary, was discussion, not decision of the question before him. That was not a grade crossing case.

The additional ground alleged in the bill that under "An act providing for the formation, establishment, and government of towns" (Chap. 113 of the Laws of 1895 [4 Comp. St. 1910, p. 5518]), and under Chap. 152 of the Laws of 1917 (2 C. S. C. S. 1911–1924, p. 2071), known as the Home Rule Act, the town has concurrent jurisdiction, was not pressed on the argument or in the briefs, and is treated as abandoned.

A perpetual injunction will issue according to the prayer of the counterclaim.

OHIO SUPREME COURT.

COOPER BUS COMPANY
v.
PUBLIC UTILITIES COMMISSION OF OHIO.

[No. 20543.]

(— Ohio St. —, 158 N. E. 543.)

Certificates of convenience and necessity — Power of Commission to prefer applicant — Automobiles.

1. The granting of a certificate to one applicant and the refusal of a certificate to another when both are equally prepared to meet all the requirements essential to the rendition of a proposed automobile service is a matter within the discretion of the Commission, p. 739.

Certificates of convenience and necessity — Power of Commission to grant overlapping certificate.

2. An order of the Commission granting overlapping certificates was not regarded favorably and modified so as to limit the operation of each carrier to specific territory, p. 739.

[October 19, 1927.]

APPEAL by protestant from order of Commission granting certificate of convenience and necessity for motor utility; order modified to limit scope of operation.

Appearances: Brown & Reed, of Columbus, for plaintiff in error; Edward C. Turner, Attorney General, Albert M. Calland, of Columbus, and F. W. Durbin, of Lima, for defendant in error.

Per Curiam: H. W. Collins was the owner of a certificate of convenience and necessity, under which he operated a bus line between Chillicothe and McArthur, Ohio. An application was made by him to the Public Utilities Commission for authority to extend said bus line from McArthur to Athens, by way of Albany.

The Cooper Bus Company has for some time been operating a bus line from Athens to Albany, and made application for authority to extend its bus line from Albany to McArthur. These applications were heard together.

The Commission granted the application of Collins, with a

restriction against carrying passengers whose whole ride is between Athens and Albany, the route covered by the Cooper Bus Company's certificate, and denied the application of the Cooper Bus Company for an extension of its line from Albany to McArthur.

The Baltimore & Ohio Railroad Company protested both applications, but withdrew its protest against the Cooper Bus Company, and later abandoned its protest against Collins, no application for a rehearing having been filed or steps taken to perfect error proceedings by that company. This proceeding in error is prosecuted by the Cooper Bus Company.

[1, 2] In so far as the applicants, Collins and the Cooper Bus Company, sought to extend their respective routes so as to render service between McArthur and Albany, the granting of the one application and the refusal of the other was wholly a matter of discretion of the Public Utilities Commission; it appearing that each of the applicants is prepared to meet all requirements essential to the rendition of the proposed service. We are of the opinion, however, that the rule announced in the case of Columbus, D. & M. Electric Co. v. Public Utilities Commission, 116 Ohio St. 92, P.U.R.1927D, 773, 155 N. E. 646, should be applied, and that in cases such as presented the Commission should not grant overlapping certificates.

The order of the Commission is, therefore, modified by so limiting the extension granted to Collins as to authorize him to operate said bus line only as far as Albany.

Order modified.

Marshall, C. J., and Day, Allen, Kinkade, Robinson, and Matthias, JJ., concur.

Jones, J., not participating.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI.

ST. LOUIS & O'FALLON RAILWAY COMPANY et al.

v.

UNITED STATES OF AMERICA et al.

[No. 7859.]

(22 F. (2d) 980.)

Return — Recapture — Railroads — Determination of amount — Reserves.

1. The return to a railroad in a case involving the recapture of excess earnings under the Interstate Commerce Act is to be measured by the net revenue remaining after deducting only the amount to be paid over to the government without deducting the amount to be placed in a reserve fund, p. 745.

Return — Railroads — Recapture of earnings — Valuation — Non-confiscatory net return.

2. An order of the Interstate Commerce Commission directing the payment of one half of excess railroad earnings over to that body is not open to attack upon the ground of wrongful valuation if the net earnings, less the amount ordered paid over to the government, be an ample return on the value claimed by the carriers for each of the recapture periods, p. 747.

Appeal and review — Questions open — Railroad operation as single system.

3. The question whether the Interstate Commerce Commission has erroneously decided that two railroads under common control and management are not operated as a single system for the purpose of computing excess return is judicially examinable by a court in which an injunction is sought against a Commission order providing for recapture of earnings, p. 748.

Return — Interstate railroad — Operation as single system.

4. A finding that two railroads under common control and management did not constitute a single system within the meaning of Interstate Commerce Act, § 15-A, paragraph 6, 41 Statute 489, was held to be sustained by evidence that a gap existed in physical connection, that there was no common traffic moving one way over the two carriers and only a small percentage the other way, and that there was no financial interdependence between them so that the low earnings of one corporation could be aided or recouped by the other, notwithstanding connections between them through a Terminal Association, p. 748.

Return — Recapture of earnings — Interstate railroads — Rate fixing as prerequisite.

5. An order of the Interstate Commerce Commission providing for recapture of excess earnings of interstate railroads cannot be declared invalid on the ground that the Commission had not, prior to any of

the recapture periods, prescribed group rates required by § 15-A, paragraphs 2 and 3, of the Interstate Commerce Act, p. 752.

Constitutional law — Delegation of powers — Prescribing rules and regulations — Interstate Commerce Act.

6. Section 15-A of the Interstate Commerce Act, providing for the recapture of excess income from railroads, is not invalid as a legislative power without prescribing a method of procedure, as it sets out completely the legislative rules and the only duty left to the Commission is the ascertainment of the fact in each case to which those rules are to be applied, p. 753.

Return — Interstate railroads — Excess earnings — Payment into reserve fund.

7. An order of the Interstate Commerce Commission providing for recapture of one-half of the excess earnings of an interstate railroad and for the payment of the other one-half into a reserve fund is not invalid on the ground that § 15-A of the Interstate Commerce Act does not impress a trust upon such portion of the excess fund, p. 754.

Constitutional law — Restriction on use of property — Railroad earnings — Payment into reserve fund.

8. An order of the Interstate Commerce Commission directing the payment of excess earnings into a reserve fund does not deny the full and unrestricted use of the carrier of what was its private property, p. 755.

Return — Recapture of excess earnings — Interest on excess — Computation.

9. An order of the Interstate Commerce Commission providing for the recapture of excess earnings of interstate railroads should require the interest from the date when, under the order, the payments found due by the order should be made, but should not require interest from four months after the respective recapture periods, p. 755.

Return — Recapture of excess earnings — Absence of income under Interstate Commerce Act provision.

10. The Interstate Commerce Commission may, under the Interstate Commerce Act, provide for recapture of excess railroad earnings for the periods between March 1, 1920, and August 26, 1920, although the increased rates installed under § 15-A, paragraph 2, of the act did not become effective until the latter date, p. 756.

[December 10, 1927.]

BILL IN EQUITY to enjoin an order of the Interstate Commerce Commission providing for the recapture of excess railroad income; order modified as to interest provision and as thus modified to stand.

Appearances: Frederick H. Wood of New York city, Robert H. Kelley, of Houston, Leslie Craven, of Chicago, and Daniel N. Kirby, of St. Louis (Cravath, Henderson and DeGersdorff, of New York city, Andrews, Streetman, Logue & Mobley, of Hous-

ton, and Nagel & Kirby, of St. Louis, of counsel) for petitioners; Blackburn Esterline and P. J. Farrell, both of Washington, Walter L. Fisher, of Chicago, and Oliver Sweet, of Rapid City, for defendant.

The opinion of **Stone,** Circuit Judge, follows in full:

The matter here involved is the validity of an order of recapture made by the Commission against the St. Louis & O'Fallon Railway Company (called O'Fallon herein). The order was made on February 15, 1927 (124 Inters. Com. Rep. 3) upon two hearings held in October, 1924, and July, 1926. The proceeding was against the O'Fallon and the Manufacturers' Railway Company (called Manufacturers' herein). The Commission found no excess net earnings against the Manufacturers' but, as to the O'Fallon, net earnings in excess of 6 per cent for each of four periods: the last ten months of 1920 and the calendar years of 1921, 1922 and 1923, and ordered one-half of such excess for each period to be paid to the Commission on or before a fixed date and the other half to be held by the O'Fallon in a "reserve fund." The body of the recapture order is as follows:

"It appearing, that in compliance with the provisions of paragraphs (4) to (9), inclusive, of § 15a of the Interstate Commerce Act this Commission entered upon an investigation into and concerning the matter of excess net railway operating income of the St. Louis & O'Fallon Railway Company and of the Manufacturers' Railway Company;

"It further appearing, that a full investigation of the matters and things involved having been had, and this Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof;

"It further appearing, that no amount of excess net railway operating income was received by the said Manufacturers' Railway Company during the periods covered by the investigation, but that the following designated amounts of excess net railway operating income were received by the said St. Louis & O'Fallon Railway Company for the periods stated:

Mar. 1 to Dec. 31, 1920, inclusive	$106,755.96
Jan. 1 to Dec. 31, 1921, inclusive	130,205.13
Jan. 1 to Dec. 31, 1922, inclusive	106,391.03
Jan. 1 to Dec. 31, 1923, inclusive	110,409.22

"It further appearing, that under the provisions of paragraph (5) of said section, one-half of such excess net railway operating income is held by the said St. Louis & O'Fallon Railway Company as trustee for the United States; that, under the provisions of paragraph (6) of said section, said one-half of such excess net railway operating income is recoverable by and payable to this Commission within the first four months following the close of the period for which the computation is made; and that, to the extent required by the provisions of paragraphs (6) and (8), the remaining one-half of such excess net railway operating income is required to be placed in a reserve fund established and maintained by said St. Louis & O'Fallon Railway Company;

"And it further appearing, that, on March 28, 1924, this Commission, by division 4, announced that interest on amounts of excess net railway operating income payable to the United States under said section would be required at the rate of 6 per cent per annum, beginning four months after the termination of the period for which the said excess net railway operating income is computed;

"It is ordered, that the amounts of excess net railway operating income which are held by the said St. Louis & O'Fallon Railway Company as trustee for the United States, under the aforesaid provisions, be paid to this Commission in Federal reserve funds, drawn to the order of the Interstate Commerce Commission and transmitted to George B. McGinty, secretary, Washington, D. C., within ninety days from the date hereof, together with interest thereon, as stated below:

With interest from—

May 1, 1921	$53,377.98
May 1, 1922	65,102.56
May 1, 1923	53,195.51
May 1, 1924	55,204.61

"It is *further ordered,* that the remaining one-half of such excess net railway operating income be placed in a reserve fund, as required by paragraph (6) of said section, as aforesaid." (at pp. 70, 71 of 124 Inters. Com. Rep.)

The present bill was filed by both companies to enjoin that order as illegal. The interest of the Manufacturers' in the order against the O'Fallon arises from the contention that, for recapture purposes, the net revenues of the two roads should be

considered as derived from "a single system" within the meaning of § 15a, paragraph (6).

The entire order is attacked upon four grounds:

(I) Because based upon an erroneous and inadequate finding of value; (II) because the O'Fallon and the Manufacturers' constituted "a group of carriers under common control and management and operated as a single system" within the meaning of § 15a, paragraph (6) of the Commerce Act, as amended [49 U. S. C. A. § 15a; Comp. St. § 8583a]; (III) because the Commission had not, prior to any of these recapture periods, prescribed the group rates required by § 15a, paragraphs (2) and (3) which, it is claimed, is a prerequisite to any recapture; (IV) because § 15a is void as a delegation of legislative power without any prescribed course of procedure or rules of decision to be followed in the exercise of such power.

The "reserve fund" provision of the order is attacked because (a) § 15a does not impress a trust upon such portion of the excess fund and (b) because § 15a and the order each results in denying full and unrestricted use of what is the private property of the railroad and, therefore, is a taking thereof without due process of law.

There are two lesser contentions: (a) that interest could not be required and (b) that income arising prior to August 26, 1920, is not subject to recapture.

I.

Valuation.

The attack upon the valuation of the property of the O'Fallon is stated to be that the Commission measured such value upon the assumed prudent investment basis and failed to give "effective and dominant consideration . . . to the cost of reproduction at the price levels existing at the time the issue arises." The "issue arises" here as to each of the several recapture periods, to wit, the last ten months of 1920 and each of the calendar years of 1921, 1922, and 1923.

The values found by the Commission for each of these periods were as follows: for the last ten months of 1920, $856,065; for 1921, $875,360; for 1922, $978,874 and for 1923, $978,246.

The amount claimed by the O'Fallon as its value during each of such periods is "not less than $1,350,000."

The United States contends that there is no question of confiscation presented here and no need to examine the accuracy of the values found by the Commission or its methods used in determining such values because, even if it might be conceded that the above value claimed by the O'Fallon is correct, yet its net earnings thereon would, less the amount ordered paid over to the Government by the order of the Commission, be an ample return thereon for each of the recapture periods.

For the purpose of resolving this contention made by the government, the value of the O'Fallon may be taken, as claimed by it, to be $1,350,000. There is no dispute as to the net earnings (undiminished by any recapture proceeding) as to each of the above four periods. Such earnings were as follows: for the last ten months of 1920, $147,519.89; for 1921, $182,726.73; for 1922, $165,123.47; for 1923, $169,103.98. The amounts ordered paid over to the government for each of these periods respectively were as follows: for the last ten months of 1920, $53,377.98; for 1921, $65,102.56; for 1922, $53,195.51; for 1923, $55,204.61. The sum ordered placed in "reserve fund" for each of such periods was the same in amount as ordered paid over. Thus, the amounts affected and controlled by the order for each of the periods was as follows: for the last ten months of 1920, $106,755.96; for 1921, $130,205.12; for 1922, $106,391.02; for 1923, $110,409.22. Subtracting the last amounts from the undiminished net returns for each period leaves, as the net income unaffected by the order, the following: for the last ten months of 1920, $40,763.93; for 1921, $52,521.61; for 1922, $58,732.45; for 1923, $58,694.76. The largest of these balances ($58,732.45) is but 4.35 per cent of the above assumed value ($1,350,000) of the property. Such a return is obviously insufficient. Therefore, it is of controlling importance, as to this contention in this case, to determine two matters.

[1] First, whether the return to the carrier in a recapture case is to be measured by the net revenue remaining after deducting both the amount to be paid over to the government and the amount to be placed in the "reserve fund" or is to be measured by the net revenue remaining after deducting only the amount to be paid over to the government. The latter is the contention of the gov

ernment. That position is based upon an expression of the Supreme Court in the only recapture case which has, so far, been decided by it. In that case (Dayton-Goose Creek R. Co. v. United States, 263 U. S. 456, at p. 486, 68 L. ed. 388, 44 Sup. Ct. Rep. 169, 33 A.L.R. 472), the Court (italics ours) said:

"The act fixes the fair return for the years here involved, 1920 and 1921, at 5½ per cent, and the Commission exercises its discretion to add ½ per cent. The case of Bluefield Water Works & Improv. Co. v. Public Service Commission, 262 U. S. 679, 67 L. ed. 1176, P.U.R.1923D, 11, 43 Sup. Ct. Rep. 675, is cited to show that a return of 6 per cent, on property of a public utility is confiscatory. But 6 per cent was not found confiscatory in Willcox v. Consolidated Gas Co. 212 U. S. 19, 48, 50, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 48 L.R.A.(N.S.) 1134, 15 Ann. Cas. 1034; in Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U. S. 655, 670, 56 L. ed. 594, 32 Sup. Ct. Rep. 389; or in Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 172, 59 L. ed. 1244, P.U.R.1915D, 577, 35 Sup. Ct. Rep. 811. Thus the question of the minimum of a fair percentage on value is shown to vary with the circumstances. *Here we are relieved from considering the line between a fair return and confiscation, because under the provisions of the act and the reports made by the appellant the return which it will receive after paying one-half the excess to the Commission will be about 8 per cent on the reported value. This can hardly be called confiscatory.* Moreover the appellant did not raise the issue of confiscation in its bill and it can not properly be said to be before us."

While the Court said that the issue of confiscation was not raised in that bill and that such issue "cannot properly be said to be before us," and, therefore, the above italicised expressions may be regarded as a *dictum* not necessary to a decision of the case, yet we cannot say that it does not represent the view of that Court as to that matter. Whatever might be our independent view as to the inclusion of the *"reserve fund"* portion with the net revenue left unrestricted with the carrier and the determination that such combined sum is to be taken as the "return" by which confiscation is to be measured, we do not feel free to disregard this seemingly clear and deliberate statement that such

combined sum is such measure. Because that is the measure and the only measure so far given by the Supreme Court in a recapture case, we feel obligated to accept it as the rule of law to be applied by us herein.

[2] The second matter to be determined is the result from applying this rule of law to the facts as shown by the evidence. Applying this measure to the undisputed evidence, such return for each of the recapture periods is as fellows: for the last ten months of 1920, $94,141.91; for 1921, $117,624.17; for 1922, $111,927.96; for 1923, $113,899.37. These amounts give a percentage return for the respective periods upon the value ($1,350,000) claimed by the carrier as follows: for the last ten months of 1920, 6.97 per cent; for 1921, 8.71 per cent; for 1922, 8.29 per cent; for 1923, 8.43 per cent.

While the question of what suffices to constitute a "fair return," in a confiscatory sense, varies with circumstances (Dayton-Goose Creek R. Co. v. United States, *supra*) yet the Supreme Court in that case (p. 486) held that a return of "about 8 per cent" could "hardly be called confiscatory" and said that a return of "6 per cent was found not confiscatory in Willcox v. Consolidated Gas Co. *supra;* in Cedar Rapids Gas Light Co. v. Cedar Rapids, *supra;* or in Des Moines Gas Co. v. Des Moines, *supra.*" These statements from the Dayton-Goose Creek case, *supra,* would clearly eliminate the returns (more than 8 per cent) on the O'Fallon for the years 1921, 1922, and 1923. That case would seem, also, to eliminate the return (6.97 per cent) on the O'Fallon for the last ten months of 1920 because that case was a recapture case and the above expressions of the court concerning the percentage of return were made, in part, concerning a recapture for the same period (last ten months of 1920) involved in this case.

From the above law and facts, it seems that this contention of the United States is well founded; that the verity of the Commission's valuation herein need not be examined and cannot affect this recapture order and, therefore, that such order is not open to attack upon the ground of wrongful valuation. If this be true, it is unnecessary to examine and determine the various contentions made by the parties and *amici curiæ* concerning the proper manner of ascertaining value herein.

II.

System Operation.

[3, 4] Section 15a, paragraph (6) (41 Stat. 489) contains a provision that

"For the purposes of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system."

This proceeding was against both the O'Fallon and the Manufacturers'. The Commission found excess earnings for the O'Fallon and found none for the Manufacturers'. Also the Commission found a common control and management but not a single system operation of the two carriers. Therefore, it denied them the application of the above statutory provision. Both carriers contend that such denial was error and that they do, within the above statute, constitute such a single system.

The United States challenges the jurisdiction of this court to examine this question. This challenge is not well made. The statute laid down the rule. It was the duty of the Commission to apply that rule to the evidence before it and to reach and state a resulting conclusion. That conclusion affects the legal rights of these carriers as fixed by the statute. The carriers claim here that this conclusion of the Commission was based upon no evidence. Therefore, that conclusion is judicially examinable, at least to the extent to ascertain whether it was the result of arbitrary action by the Commission—that is, whether the conclusion was reached without the necessary basis of evidence (Northern P. R. Co. v. Department of Public Works, 268 U. S. 39, 44, 45, 69 L. ed. 837, P.U.R.1925D, 93, 45 Sup. Ct. Rep. 412; Ohio Valley Water Co. v. Ben Avon, 253 U. S. 287, 297, 64 L. ed. 908, P.U.R.1920E, 814, 40 Sup. Ct. Rep. 527; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 547, 56 L. ed. 308, 32 Sup. Ct. Rep. 108).

The statutory requirement is that to be entitled to treatment as a "group," the carriers must be "under common control and management" and must be "operated as a single system." Whether such requirements exist is a matter of fact to be determined from the evidence. There is no substantial contradiction in the evidence but the difference arises mainly from the conclusion of ultimate fact to be deduced from the evidence. There is little room for such difference in so far as "common control and management" is concerned for the evidence is clear that the Adolphus Busch estate owns a large majority of the stock of both carriers and that there is a common executive and office force which handles and controls the business of each. The real point of difference is whether the two are "operated as a single system." The evidence upon this point is well stated in the report of the Commission (124 Inters. Com. Rep. 3, 8–10) as follows:

"The Manufacturers' owns and operates about thirty miles of track in St. Louis, of which five miles are classified as main track and twenty-five miles as sidings or industrial tracks. Its construction was commenced in 1887 by the interests which controlled the Anheuser-Busch Brewing Association. The Manufacturers' is purely a switching road, moving cars between various industries and the trunk lines, or the line of the Terminal Railroad Association of St. Louis, hereinafter called the Terminal. It issues no waybills, but issues receipts to shippers and transmits bills of lading to the trunk lines by which regular waybills are made out.

"The O'Fallon operates about nine miles of main line and twelve miles of yard track and sidings in Illinois, the former extending from coal mines owned by the Adolphus Busch estate westward to a connection with the tracks of the Terminal in East St. Louis. Its traffic is almost exclusively coal in carloads, which is distributed widely through the Northwest, moving from origin on regular billing. Through the medium of the Terminal its shipments are delivered at various points in St. Louis, some of which are on the tracks of the Manufacturers'. Control of the O'Fallon was acquired by the Busch interests in 1913. The industries of the controlling interests have never used more

than 8 per cent of the coal shipments from the O'Fallon. The distance between the railroad of the O'Fallon and the railroad of the Manufacturers' is about twelve miles, and communication by rail between the two properties is effected over the tracks of the Terminal, including a bridge over the Mississippi river. Upon the completion of a new bridge, referred to as the municipal bridge, it is proposed to construct tracks which will effect direct physical connection between the Manufacturers' and the O'Fallon; and, in preparation for this development, the O'Fallon has acquired and holds about thirty acres of land near the eastern approach of the new bridge. These carriers operate engines and other equipment from one line to the other over intervening tracks hereinbefore described; but there is no written contract or other arrangement for such use, and a special arrangement is necessary for each movement. Due to the difference in traffic handled by the Manufacturers' and the O'Fallon, there is no occasion for regular through operation of trains over the lines of these carriers. . . .

"The general offices are located in St. Louis. There is an engine repair shop located on the Manufacturers' in St. Louis and the O'Fallon has a car repair shop on its line. Repair work on equipment for both carriers is done at these shops as well as similar work for other carriers. Work done for either carrier in the shop of the other is charged for the same as for work done for any other carrier.

"The rates to and from points on the Manufacturers' are the St. Louis rates, to which the Manufacturers' is a party, and out of which it gets revenue in the form of a switching or terminal charge which is absorbed by the line-haul carrier. The O'Fallon is also a party to many joint rates with trunk lines. The companies render separate operating reports to us.

"The above statement of facts is applicable, without material modification, to the entire period of three years and ten months covered by this investigation."

Only a very small percentage of the traffic originating on the O'Fallon moves to points on the Manufacturers' and practically no traffic moves from the Manufacturers' to the O'Fallon. There

is no common financial responsibility or intermingling of financial obligations and benefits as between the two carriers.

To this statement it may be added that the O'Fallon was acquired by the Busch interests with the apparent purpose of connecting it up with the Manufacturers' and thus furnishing a complete system consisting of connected terminals on both sides of the river but this has never been done and was not the situation at the time of these recapture periods. This evidence seems to justify the conclusion of the Commission that "They stand apart in physical location, in the character of traffic handled, in the conduct of their financial transactions, . . ." (At p. 11 of 124 Inters. Com. Rep.) A mere short gap in physical connection might not be sufficient to prevent these carriers being regarded as "a single system" within the statutory meaning. But where such gap exists and thereto is added the considerations that there is no common traffic moving one way over the two carriers and only a small percentage the other way it is difficult to believe that the two are operated as the "single system" intended by the statute. Also, there is no financial interdependence between them so that the low earnings of one corporation can be aided or recouped by the other.

It is strongly urged that there is an actual physical or at least a legal connection between the two roads arising from the fact that the Terminal Railroad Association, which owned and operated the trackage between these two carriers, was declared to be the "agent" and "servant" of the roads with which it connected in the so-called Terminal Railroad Cases (United States v. Terminal R. Asso. 224 U. S. 383, 56 L. ed. 810, 31 Sup. Ct. Rep. 507; 236 U. S. 194, 59 L. ed. 535, 35 Sup. Ct. Rep. 408; Terminal R. Asso. v. United States, 266 U. S. 17, 69 L. ed. 150, 45 Sup. Ct. Rep. 5). It may be, that for the legal purposes involved in those cases, the Terminal is an agent or servant of every road connecting with it which uses its facilities. But we are dealing now with a matter of statutory construction—the question being whether, in this statute, "operated as a single system" was meant to include such a situation as is here present. The fact of a mere physical break in the trackage does not seem to us

to be determinative. The Wabash, which goes both East and West from St. Louis, might, within this statute, be a "single system" even though there be a short break in its physical connection. Such conclusion might not be affected even though that break is bridged by an entirely independent carrier if the only place therein of such independent carrier is that of transfer from one Wabash trackage to another. But here these two carriers have no traffic carrying or operating unity except for the small amount of coal delivered to the Manufacturers' from the O'Fallon and no financial interdependence. Therefore, we think, the Commission correctly held these two carriers not to be "operated as a single system" within the meaning of this statute.

III.

Rates under Section 15a as Prerequisite to Recapture.

[5] This contention is that paragraphs (2) and (3) of § 15a require the Commission to fix rates in a group of carriers so that the earnings of such group carriers shall, "as nearly as may be," yield a fair return upon the aggregate value of such carriers and shall from time to time determine what percentage upon such value will produce such fair return; that until such rates are fixed and operative, there can be no recapture of earnings from any carrier within such group; that no such rates had been established at the periods covered by this recapture order and that the aggregate earnings for all the carriers in the group in which the O'Fallon falls were, for these recapture periods, less than the temporary percentage allowed thereon by paragraph (3).

The recapture provisions are in paragraphs (5) to (16) inclusive and paragraph (18) of the section. Of such paragraphs, (5) and (6) are here important. Paragraph (5) provides that the earnings of any carrier in excess of the percentage established under paragraph (3) by the Commission shall be subject to recapture. Paragraph (6) fixes a minimum percentage of 6 per cent beyond which earnings are to be regarded as an excess and may be recaptured.

Paragraphs (2) and (3) relate to fixing of rates, having in

view all of the carriers of a group. Paragraphs (5) and (6) have to do with recapture of excessive earnings from individual carriers. We see no necessary nor logical dependence of the latter upon the former and we find no expression nor implication in the section leading to such result. The only relation between these paragraphs seems to be that the percentage fixed by the Commission under paragraph (3) as constituting a "fair return" shall, under paragraph (5), measure "fair return" (therefore, excess earnings) for recapture purposes, with a maximum percentage limitation of 6 per cent under paragraph (6). Here, the recapture is sought for the claimed excess above the maximum percentage of "fair return" permitted by paragraph (6) hence no percentage fixed or not yet fixed by the Commission under paragraph (3) for earnings by the group can have any effect upon the rights of this carrier.

Also, there may be significance in the provision of paragraph (3) fixing a temporary percentage of return for two years beginning March 1, 1920. Obviously, one purpose of this provision was to bridge the period following the effective date of this act (Approved, February 28, 1920) during which the Commission should under paragraphs (2) and (3) form the carriers of the country into groups and determine the percentage constituting "fair return" under paragraph (3). Since the only connection between paragraphs (2) and (3) and paragraphs (5) and (6) is the percentage constituting fair return, the above provision is, at least, persuasive that the Congress intended thereby expressly to remove all thought of suspension of operation of paragraphs (5) and (6) until after determination by the Commission of the percentage of return under paragraph (3).

This contention of appellants must be denied.

IV.

Procedure.

[6] It is contended that § 15a is invalid as a delegation of legislative power without prescribing a method of procedure. The section defined the duties of the Commission as to fixing rates, declared what should be excess income subject to recap-

ture, the disposition to be made by the Commission of the recaptured funds coming into its hands and the disposition of the portion going into the "reserve fund" left with the carrier. As to recapture it fixed a maximum percentage of return as a basis of earnings and directed the Commission as to the ascertainment of property value to which that percentage should apply. In short, the section set out completely the legislative rules. The only duty left to the Commission was the ascertainment of the facts in each case to which those rules were to be applied by it. It left the Commission no discretion as to the application of those rules of law to the facts found by it. Therefore, no legislative power was delegated (United States v. Grimaud, 220 U. S. 506, 516, 55 L. ed. 563, 31 Sup. Ct. Rep. 480). The section (paragraph 9) authorizes the Commission to "prescribe rules and regulations for the determination and recovery of the excess income payable to it" having in mind the mere administrative procedure before it (such as hearings, notices, etc.) having to do with the ascertainment of the matters of fact committed to it by the section. Moreover, a full hearing was had herein.

V.

The "Reserve Fund."

[7] After requiring that one-half of the excess earnings found by it for each of the recapture periods be paid over to the Commission, this order of recapture contained a provision "that the remaining one-half of such excess net railway operating income be placed in a reserve fund, as required by paragraph (6) of said section, as aforesaid." (124 Inters. Com. Rep. at p. 71).

This provision of the order is attacked upon two grounds. The first of these grounds is that § 15a does not impress a trust upon such portion of the excess earnings. Paragraph (6) provides that such portion of the excess earnings "shall be placed in a reserve fund established and maintained by such carrier." Paragraph (7) provides that the carrier can use this fund for no "other purpose" than to supply dividend deficiencies, up to 6 per cent, of subsequent years. Paragraph (8) provides that

such fund need be maintained only up to 5 per cent of the value of the carrier. The purpose of these provisions is obvious. It is to segregate a special fund, of a stated maximum, for a prescribed purpose. It is of no moment whether this be denominated a trust or not. The intention is clear and the only question is one of legislative power.

[8] The second ground for challenging this portion of the order is that it denied the full and unrestricted use to the carrier of what was its private property. The Dayton-Goose Creek Case (263 U. S. 456, 484, 68 L. ed. 388, 44 Sup. Ct. Rep. 169, 33 A.L.R. 472) has determined that Congress had power to hold the carrier to a reasonable return and to control all excess thereover. If that power extends to entirely taking from the carrier one-half of such excess, as there held, it more clearly would cover limitations of use by the carrier of the other half.

VI.

Interest.

[9] The order of the Commission required payment of the recapture amount for each of the various periods with interest thereon at 6 per cent from a time four months after the end of such period. The allowance of any interest is challenged. The section (paragraph 6) requires one-half of the excess earnings to be paid over to the Commission "within the first four months following the close" of the recapture period. Evidently, it was upon such provision that the Commission based its claim of power and right to require interest from the end of such four months' period. While this provision obligated the carrier to pay over within the four months, yet where there is, as here, a bona fide contention that there was no excess earned, no liability for interest could arise until it had been ascertained whether and in what amount there was an excess to be paid over. The carrier contends that such liability is not ascertained, or liquidated, until it has been determined judicially. We think the section (paragraphs 4, 6, and 9) made it the duty of the Commission to determine, the amount due and that, where there is

a dispute, such determination is a liquidation of such for interest purposes.

Therefore, the Commission erred in requiring interest from four months after the respective recapture periods but not in requiring interest. The order should be modified to require interest from the date when, under the order, the payments found due by the order should be made—this was ninety days after date of the order, entered February 15, 1927, 124 Inters. Com. Rep. 3.

VII.

Period March 1 to August 26, 1920.

[10] It is contended that, in no event, could there be recapture for the period between March 1, 1920 and August 26, 1920. This contention is, in a reduced form, the same as treated above under heading III. It is that prior to August 26, 1920, this carrier received no income under the provisions of § 15a (paragraph 2) because the increased rates installed thereunder did not become effective until that date. As said above (heading III), the section seems to fix March 1, 1920 as the beginning of the time for recapture and the fixing of rates (under § 15a or otherwise) has no effect upon that matter.

Conclusion.

The order should be modified to allow interest on each of the amounts found by the Commission from June 17, 1927, and as thus modified should be sustained.

It is so *ordered.*

Van Valkenburgh, Civ. J., concurs.

Faris, D. J., concurs in opinion filed.

An order will be entered herein at the court in St. Louis on December 19, 1927, at 9:30 A. M., at which time the court will consider any matters in connection therewith or in connection with any appeal therefrom.

The concurring opinion of Faris, D. J., follows in full:

I concur in the result reached in the opinion of Judge Stone,

and concur fully in the views expressed as to the matter of interest overcharge. I also agree with the conclusion that the plaintiffs' railways do not constitute under the law upon the facts a "single system," "under common control and management" and "operated as a single system." It may well be that here, the findings of the Interstate Commerce Commission upon this point are not reviewable by this court. But the latter point need not be ruled. For, while it may, at least *arguendo,* be conceded that plaintiffs' railways are under "common control and management," the facts do not in my opinion, show that they are "operated as a single system." Under subdivision (6) of § 15a of the Interstate Commerce Act, as amended by the Transportation Act, passed on February 28, 1920 (41 Stats. 488), both of these verities must contemporaneously exist; since upon the facts, here but one of them is present, the plaintiffs' railways constitute for recapture purposes, two separate entities. I shall (for brevity's sake,) call the complaining plaintiff O'Fallon, simply.

I concur in the view that the Interstate Commerce Commission, (hereinafter called Commission) did not err in considering as a part of the recapture period, the last ten months of the year 1920; that is, the ten months of the year 1920, following the effective dates of the Transportation Act and of § 15a of the Interstate Commerce Act, (allocated to the latter act, but enacted as a part of the former act.) It may be true, as plaintiffs contend, that technically no carrier received any income under the provisions of § 15a, because no increase of rates and no adjustment of rates were formally made or authorized, till the order of the Commission of August 26, 1920 (See 58 Inters. Com. Rep. 220). (Reduced Rates 1922, 68 Inters. Com. Rep. 676.) But since the recapture provisions took effect, when the Transportation Act became the law, that is on March 1, 1920, and since the O'Fallon earned money subject to recapture without any increase or adjustment of rates, it is my opinion that it cannot take advantage of this situation, even though some of the carrier members of the group to which it is allocated, might have been entitled to an adjustment, or an

increase of rates which they did not get before the order of August 26, 1920.

Plaintiffs contend that confiscation has happened by reason of the use of elements of valuation not in accord "with the law of the land," which concededly, at least among other things, is to be regarded in reaching a valuation of the properties of O'Fallon used in the service of transportation. On the other hand the government and the Commission contend, that upon no view is confiscation present, for that the matter is merely one wholly solvable by a proper construction of the apposite statutes. It may be conceded that if the contentions of the Commission and the government both as to the law and the facts in the case are correct, there is no confiscation. But if plaintiffs' contentions in such behalves are correct, I think confiscation is obvious. So, the case differs upon the point in a way in no wise unique or contrary to the ordinary case wherein constitutional questions are urged by the one party and combated by the other, and so the insistence of the defendants seems a begging of the question.

Defendants use this mathematical formula in demonstration of this contention, to wit:

"For 1922, 6 per cent on $978,874, the value found by the Commission, is $58,732.44. For 1922 the net railway operating income was $165,123.47. Subtract the $58,732.44 and the difference is $106,391.03. One-half is $53,195.51. Add $58,732.44 and $53,195.51 and the sum of $111,927.95 is O'Fallon's share. That amount is equivalent to 11.43 per cent on $987,874; and 8.29 per cent on $1,350,000, the value alleged by O'Fallon in the amended petition."

Adopting the identical formula, but using the valuation of $1,350,000, contended for by plaintiffs, the final figures reached are $123,087.44, instead of $111,927.95 which is about 9 per cent on the valuation for which plaintiffs contend. Subtracting $123,087.44 from $165,123.47 which is the net operating income for the year 1922, the result is $42,136.03, which the Commission should have exacted, whereas, it seeks to take for the year 1922, $53,195.51. With deference however, I think the formula has been carried too far. The controlling final

figures would have resulted, had the wholly unnecessary final addition and final subtraction not been done. For example: Six per cent of $1,350,000 is $81,000; the net operating income for the year 1922 was $165,123.47. Subtract from such income the $81,000, which plaintiffs contend the O'Fallon is entitled to, and there is left the sum of $84,123.47, only, subject to treatment for recapture purposes; one-half of which is $42,061, in round numbers; yet the Commission seeks to take $53,195. In my opinion there thus appears a clear confiscation of some $11,000 provided, the methods of valuation used by the Commission were not in accord with the rules and elements which serve to make up the law of the land. Since the matter of rate-making is not involved I think the question is not one as to what money O'Fallon was allowed to keep, but one of what money was taken away from it. And this condition exists, regardless of whether the burdens and restrictions put upon the moiety of $42,061, left in O'Fallon's hands constitute confiscation of that money or not.

I am unable to avoid the conclusion that the restrictions put by § 15a of the Transportation Act, on the use of that one-half of the surplus of annual earnings above 6 per cent, which is left in the carrier's hands is, at least a form of confiscation. But it is not, in my opinion, necessary to decide whether such burdens and restrictions saddled by the act on this moiety constitute confiscation. The matter well may be permitted to rest on the taking of the $11,000, through an alleged application of illegal elements in reaching the value of O'Fallon's properties used in the service of transportation. If the alleged fact of confiscation includes the contention that such confiscation exists here because the O'Fallon physical properties were not valued by a consideration of the identical elements used in valuing real estate and ordinary chattels, I think the answer lies in the inherent differences in the nature of the two sorts of properties. And that confiscation does not arise from the mere fact of the use of different methods. Certainly, this is true if in their nature the two sorts of properties can not be valued fairly as to either, if the identical rules be used. I am

of the opinion that the latter situation is presented by the facts, for reasons and conclusions I have hurriedly set down.

The question here I repeat, is one of valuation for recapture-of-profits purposes and not one of valuation for rate-making purposes. The matter of valuation for rate-making purposes is involved incidentally and in a way adventitiously only. With deference then, I am of the view that this court can not avoid the necessity of meeting the question of legal methods of valuation, *vel non,* face to face. Again with deference, I am constrained to the view that what was said in the case of Dayton-Goose Creek R. Co. v. United States, 263 U. S. 456, 486, 68 L. ed. 388, 44 Sup. Ct. Rep. 169, 33 A.L.R. 472, was *obiter dictum,* and clearly meant to be so, by the distinguished and learned writer of that opinion. Moreover, in the Dayton-Goose Creek Case, *supra,* the correctness of the valuation was not attacked, but at least tacitly conceded.

No excusable reason exists for adding to the length of these views, by setting out the reasons for the positions I take, upon the below propositions. I content myself by saying that my opinion is: (a) That from the case of Smyth v. Ames, 169 U. S. 466, 546, 547, 42 L. ed. 819, 18 Sup. Ct. Rep. 418, to the last utterance of the Supreme Court of the United States, no hard and fast rule has ever been laid down by that court touching the manner of the valuation *of the properties of railroads, used in the service of transportation;* (b) that the provisions of § 15a of the Transportation Act and § 19a of the Interstate Commerce Act, as amended (49 U. S. C. A. § 19a; Comp. St. § 8591); are parts of "the law of the land," to which some reference must be made and much deference must be given; (c) that § 15a of the Transportation Act considered, as it requires, in connection with § 19a of the Interstate Commerce Act as amended inevitably contemplates, both from the language used and from the standpoint of practicability, one basic valuation which shall stand as such so long as the law itself shall continue in force; (d) that to this basic valuation and in order to keep it up to date, there must be annually added increments accruing to capital, on the basis of the prudent investment value of such increments; (e) therefore, a valuation arrived at *by the sole use of either* the pru-

dent investment theory bottomed upon cost when constructed, or upon the theory of the present cost of reproduction new, less depreciation, would work presently to the public and eventually to the carriers themselves such monstrous inequity, as to preclude wholly the use of either of such methods exclusively, and eliminate the notion that Congress contemplated the exclusive use of either of such methods; (f) that the Transportation Act and the apposite provisions of the Interstate Commerce Act constitute a radical departure from ancient policies, by which, in a way, the United States went into a sort of partnership with all of the carriers affected by it, but yet left other and local public utilities, though impressed with a public interest, wholly unaffected by the act; (g) that this difference is inherent and arises *inter alia* from the absolute necessity annually to value the properties of all carriers subject to the provisions of the act, (and which, as to many of them, would be physically and wholly impossible, without using a basic value fixed once for all time) and the lack of necessity so to value annually, if ever, local light, power, gas, water, telephone and other such public utilities; (h) that the "law of the land," considered apart from the provisions of the Transportation Act, and §§ 15a and 19a of the Interstate Commerce Act and excluding *pretium affectionis* as irrelevant, provides but two tests, or measures of value, to wit, *value in use* and *value in exchange;* (i) that the test of value in use, is inapplicable because of the provisions of the Transportation Act and §§ 15a and 19a, *supra,* (now allocated in the code to the Interstate Commerce Act) and because, for rate-making purposes, it involves the so-called vicious circle, whereby the more a carrier earns the more it would be entitled to earn, and so hence to infinity; (j) that for all practicable purposes, value in exchange cannot be considered because of the conceded impossibility of procuring a buyer for a great railroad property, at its actual value or at either its prudent investment value, or its value arrived at, by taking the present reproduction cost, less depreciation; (k) that value in exchange is tantamount to fair and reasonable market value, which is made up of expert opinion, but which is not necessarily dependent, upon either original cost, or the cost of repro-

duction new at the time of sale, or at the time of the valuation, and (1) therefore, the value of the physical properties of a common carrier under the recapture provisions of the Interstate Commerce Act ought to be the net result of expert opinion, reasonably and honestly exercised (and informed by a consideration of the information required by statute to be obtained) as is to be deduced from a fair analysis of the items considered and of the methods employed in the valuation, and the items considered and the methods employed should in addition to the use in the valuation of the statutory information (§ 19a Subdivision (b) Interstate Commerce Act as amended February 28, 1920, and June 7, 1922), take into consideration the average of known price-levels for both labor and materials over a fair term of years preceding the valuation, as well as for a fair term of years thereafter, based on the trend of such levels according to historical observation and human experience.

Concededly, as to ordinary goods and chattels, as well as to real estate (touching which latter the doctrine of present value was followed, and as to which there is here no controversy), the owner, as he must bear decreases in value, or price, is by the same token, entitled to all increases in value. This, as to such commodities, may be conceded to be "the law of the land." But all such commodities have either, or both value in use and value in exchange; nor are they hedged about by the provisions of the Transportation Act and the apposite clauses of the Interstate Commerce Act. Railroads are under the existing law and policy governed by these acts, and they have, (certainly for rate-making purposes, and the identical yard-stick, perforce these acts measures and governs both rate-making and recapture bases values) neither value in use as the sole test of value, nor value in exchange.

Obviously, the statute itself, (§ 19a, *supra*) in requiring examination, in the work of valuation, into "the net and gross earnings" of the railroad being valued, fairly commands consideration of the element of value in use. But the element of value in use is not the sole test enjoined, either under the above statute, or outside of it, and by the law of the land. I think it must

be conceded that carriers, under the recapture provisions of the Transportation Act, have a value in use. But such value is not the sole test; it is only to be considered among other things. If it were the sole test, then since, upon what I conceive to be the weight of authority and the reason of the thing, it can not be so used in valuation for rate-making purposes, it would be necessary to take the arbitrary view that valuation for recapture-of-profits purposes is paramount. For but one valuation for both purposes is contemplated by the statutes. Certainly, it was not intended by the Congress that separate valuations employing different elements of value should be made.

Briefly, I am constrained to reach some of these views from the fact that, perforce the provisions of § 15a of the Interstate Commerce Act, the Commission is permitted to "utilize the results of its investigation under § 19a of this act, so far as deemed by it available." As aids to the valuation of the "property owned or used by every common carrier," under the provisions of § 19a of the act, a vast amount of information is required to be obtained by the Commission, embracing, *inter alia, original cost to date; the cost of reproduction, less depreciation,* an analysis of the methods by which such costs are obtained, and the reasons for any existing differences, if any; the history and organization of the present, or any predecessor corporation; any increase or decreases of stocks, bonds, or other securities and the money received therefor; the net and gross earnings of the corporation; the moneys expended and for what purpose expended; the amount and value of any aid, gift, donation, or grant of right of way, by any individual, or by the government, any state, county or other municipality, as well as the disposition thereof and/or of the money derived therefrom. (See, subdivisions first, second, third, fourth, and fifth of § 19a, *supra.*)

Paragraph (f) of subdivision fifth of § 19a, *supra,* says, "upon the completion of the valuation herein provided for the Commission shall thereafter in like manner keep itself informed of all extensions and improvements, or other changes in the condition and value of the property of all common carriers, and shall ascertain the value thereof, and shall from time to time

revise and correct its valuations, . . . which valuations, both original and corrected, shall be tentative valuations." But tentative alone in the sense, that notice thereof must be given and protests, if any heard; but upon giving notice, as provided for in paragraph (h) of subdivision fifth of § 19a *supra*, and absent protest, from either the state or the carrier itself, within thirty days, *such valuation becomes final.*

Upon the above provision, and upon the obvious physical fact, that the annual valuations, which must be made for recapture-of-profits purposes, would, as to a great railroad system, be so impracticable as to be impossible and would thus utterly preclude the enforcement of the recapture provisions of the act, (which provisions are characterized as the heart of the act,) I base the conclusion that a basic valuation once for all time, must inevitably have been contemplated by the Congress.

For the above reasons and conclusions, I am not convinced that the Commission erred, but am of the opinion that it reached the valuation found by it in the only way possible, in a situation so difficult as that absolute certainty and correctness is well-nigh finitely impossible. Therefore, I concur in the result.

COLORADO PUBLIC UTILITIES COMMISSION.

RE HENRY MUSCATI.

[Application No. 651, Decision No. 1246.]

Certificates of convenience and necessity — Sightseeing and tourist business — Limited period.

Authority was granted to operate a motor carrier system for the transportation of passengers in sightseeing and tourist business in the so-called Pikes Peak region for one year, pending the better determination of what the public convenience and necessity required.

[May 25, 1927.]

APPLICATION for a certificate of public convenience and necessity authorizing motor carrier service; application granted.

Appearance: J. W. Kriger, Colorado, for applicant.

By the **Commission:** The above application, in addition to

a large number of applications heard by this Commission, proposes a motor transportation system for the transportation of passengers to all the scenic attractions in the so-called Pikes Peak region. The proposed operation is solely for the purpose of serving the tourist and sightseeing public from Manitou, Colorado; there is no proposal to operate on a regular schedule, nor is there any suggestion that the proposed operation would be in competition with any established transportation service for passengers operated on schedule. All operations over the routes designated are limited solely to round trip service and no one way operations are in contemplation.

A number of the larger sightseeing motor operations in Colorado Springs have suggested to the Commission that a certificate be issued at this time for the period of one year, in order that the Commission, as well as the operators, may have the benefit of a regulated service of this kind of an operation over that period to better determine what the public convenience and necessity requires.

The Commission is frank to admit that there are several problems in connection with these operations that it is not now in a position to answer, and which may be more satisfactorily adjusted and determined after the experience under regulated service of one year's operation. Some of the applicants in this sightseeing and tourist business also operate a taxi service, as well as renting cars by the hour and the day to wherever a patron may desire to go. The Commission, on the record made, has been unable to determine now just how to regulate such service and, therefore, defers any opinion as relating to such service until the final determination of this application.

The Commission is of the opinion that the public convenience and necessity requires that the applicant herein receive a certificate of public convenience and necessity to operate a motor transportation system for the transportation of passengers in the sightseeing and tourist business for one year from the date of this order, subject to such conditions as the Commission deems the public convenience and necessity requires. The Commission, however, will retain jurisdiction over this application for final determination some time within the next year, unless such

time is further extended, and the record made in this application shall be taken into consideration in addition to such further record as may be deemed necessary before such application is finally determined.

ORDER.

It is therefore *ordered*, that the public convenience and necessity requires that a certificate of public convenience and necessity be issued to the applicant herein for the term of one year, to operate a motor transportation system for the transportation of passengers from Manitou, Colorado, to the various scenic attractions in the Pikes Peak region, and this order shall be taken, deemed, and held to be a certificate of public convenience and necessity for one year from the date hereof, subject to the following terms and conditions which, in the opinion of the Commission, the public convenience and necessity requires:

(a) That all sightseeing and tourist operations by the applicant herein shall be limited to round trip operations originating and terminating at the point of origin of the service.

(b) That no one way transportation of passengers is permitted to any of the points in said Pikes Peak region.

(c) That the quantity of equipment to be used in this operation shall be limited to such as appears in the testimony offered at the hearing herein.

(d) That the certificate of public convenience and necessity hereby issued shall be good for one year only from the date hereof, and that the Commission retains jurisdiction over the application herein for further hearing and determination, and for such disposition as the Commission deems the public convenience and necessity shall require.

It is *further ordered*, that the applicant herein shall file tariffs of rates, rules, and regulations as required by the rules and regulations of the Commission governing motor vehicle carriers within a period of not to exceed twenty days from the date hereof; and that this certificate is issued subject to compliance by the applicant with the rules and regulations now in force or to

be hereafter adopted by the Commission with respect to motor vehicle carriers, and also subject to any future legislative action that may be taken with respect thereto.

Note.—Similar applications were granted in the same manner on May 25, 1927, in Re Hoepner, Application No. 664, Decision No. 1247; Re Nuttall, Application No. 776, Decision No. 1248; Re Beals, Application No. 847, Decision No. 1249; Re Collins, Application No. 849, Decision No. 1250; Re Seven Falls Co. Application No. 750, Decision No. 1251; Re Lepel, Application No. 855, Decision No. 1252; Re Heter, Application No. 856, Decision No. 1253; Re Parker, Application No. 862, Decision No. 1254; Re Spradling, Application No. 864, Decision No. 1255; Re Walker, Application No. 865, Decision No. 1256; Re Clark, Application No. 877, Decision No. 1257; and on June 14, 1927, in Re Hailey, Application No. 639, Decision No. 1317; Re Gribble, Application No. 656, Decision No. 1318; Re Cook, Application No. 872, Decision No. 1319; Re Madison, Application No. 874, Decision No. 1320; Re Taylor, Application No. 846, Decision No. 1321; Re Fain, Application No. 910, Decision No. 1322. Likewise in the case of several applications for authority to operate a round-trip motor carrier service from Boulder, Colorado, for sightseeing, certificates were granted for a period of one year. Re Rice, Application No. 845, Decision No. 1265; Re Yellow Cab Co. Application No. 838, Decision No. 1266; Re Clark, Application No. 859, Decision No. 1267; Re Gordon, Application No. 851, Decision No. 1268; Re Brandhorst, Application No. 850, Decision No. 1269; Re Hall, Application No. 848, Decision No. 1270; Re Armstead, Application No. 882, Decision No. 1271; Re Armstead, Application No. 883, Decision No. 1272; Re Grant, Application No. 884, Decision No. 1273; Re Dunning, Application No. 887, Decision No. 1274; Re Harris, Application No. 895, Decision No. 1275; Re Townsend, Application No. 896, Decision No. 1276; Re Wacker, Application No. 897, Decision No. 1277, June 1, 1927.

P.U.R.1928A.

COLORADO PUBLIC UTILITIES COMMISSION.

PIKES PEAK CONSOLIDATED FUEL COMPANY
v.
DENVER & RIO GRANDE WESTERN RAILROAD COMPANY et al.

[Case No. 272, Decision No. 1372.]

Procedure — Successive rehearings.

Leave to file a second application for rehearing of a case in which an order has been issued by the Commission should not be granted because the parties have been misadvised as to legal procedure when no new grounds are stated.

[July 14, 1927.]

APPLICATION for rehearing of a Commission order; denied.

Appearances: L. J. Williams, Denver, for complainant; W. M. Campbell, Denver, for defendants.

By the **Commission:** On December 18, 1924, the Commission signed an order disposing of the questions raised by the complaint and answers. Two applications for rehearing were filed, that of the Denver & Rio Grande Western Railroad Company et al., being dated December 24, 1924. The applications for rehearing were denied on January 12, 1925. Thereafter the defendants, in the manner provided by § 2961 of the Compiled Laws of 1921, filed in the supreme court their petition for a writ of review, which was issued and served upon this Commission. Thereafter, and on February 11, 1926, the supreme court, after having rendered its opinion in Clark v. Denver & I. R. Co. 78 Colo. 48, P.U.R.1926B, 33, 239 Pac. 20, dismissed said writ of review on its own motion.

On April 24, 1926, the Denver & Rio Grande Western Railroad Company, the Atchison, Topeka & Sante Fe Railway Company and the Colorado & Southern Railway Company filed what is termed an application for rehearing, in which they allege "that the ends of justice demand that they be permitted to file

this second application for rehearing." They further request that in the event the application for rehearing should be denied, the order of December 18, 1924, be amended so the petitioners may be given sixty days additional time in which either to put into effect the rates prescribed in said order, or to take such other steps as they may deem necessary for the protection of their rights.

The complainant filed objections to the application and moved that the same be stricken.

The defendants undoubtedly exercised good faith in attempting to secure a review of the order of this Commission lowering certain rates on coal and slack, and doubtless did not know until the decision was made in the Clark case, *supra,* that that part of the Utilities Act seeking to impose original jurisdiction upon the supreme court is unconstitutional. The Commission always welcomes reviews of its orders in order that the rights of the parties may be safeguarded and the Commission in its future proceedings may have the benefit of the decisions passing on its orders. Moreover, we sympathize with the hard situation now occupied by defendants, but no new grounds, aside from the hardship resulting from the predicament in which the defendants find themselves, are stated.

We doubt whether in an ordinary case we should permit successive applications for rehearing, assuming that we have the power so to do. If not permitted in the ordinary case, should an exception be made in cases where the parties have been misadvised as to legal procedure so that they may start again on the right track? We believe not. Concerning both the granting of a rehearing and amending the original order to meet the particular situation, we believe the language of the supreme court in the Clark case, *supra,* is applicable: "We know of no rule which requires or sanctions such an order." An order granting a rehearing really involves a consideration of the original order and a conclusion that the same might probably be erroneous. The said order in this case was made by the Commission before two of the present members thereof were appointed. We believe

a proper regard for orderly procedure requires that when a case has been decided, an application for rehearing has been heard and denied, and the case has thus reached what ordinarily is considered its final stage before review, the Commission, as constituted from time to time thereafter, should not continue hearing and granting applications for rehearing although possibly (we do not say or intimate actually) the majority opinion on the questions originally determined might change with each change of membership of the Commission. What the Commission as now constituted might have decided if the questions determined had originally been presented to it, we do not know.

In passing we might say that we are not unmindful of the decision of the supreme court in People ex rel. v. District Court of Weld County, 76 Colo. 169, 229 Pac. 1113, in which it was held that the power is inherent in a court to set aside its judgment and grant a new trial when the action is demanded by justice. That power existing in a court is doubtless an equitable power which it is doubtful whether this administrative body has. Moreover, in that case the failure of the parties seeking a review in the supreme court to procure their bill of exceptions was due, not to an error as to legal procedure, but to an alleged impossibility in fact without fault on their part to procure such bill.

It would seem that probably the defendants in this case have the power to raise the questions, originally determined, in a new proceeding, if they should be so advised. Therefore, their situation is not so serious as might first appear.

Under all the circumstances, the Commission is of the opinion that the defendants' motion for leave to file the second application for rehearing should be denied.

P.U.R.1928A.

COLORADO PUBLIC UTILITIES COMMISSION.

RE HENRY P. KIDD et al. doing business as White Motor Express Company.

[Application No. 293-A.]

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al.

v.

HENRY P. KIDD et al. doing business as White Motor Express Company.

[Case No. 306.]

(Decision No. 1381.)

Certificates of convenience and necessity — Grounds for revocation — Unauthorized business — Competition as excuse.

1. Public convenience and necessity was held not to require the revocation of a certificate authorizing motor carrier service because of the failure of the holder to observe the restrictions in the certificate relating to property to be transported where the law relating to motor carrier regulation had been unsettled and the unauthorized service was begun on account of competition by unauthorized carriers, it appearing further that upon revocation of the certificate no one but the unauthorized carriers would be in position to handle the business, p. 772.

Parties — Petitioners — Copartnership.

2. Authority to transfer a certificate of convenience and necessity should not be denied because two copartners did not join in the application, if the original application was signed with the firm name and at the hearing it is shown that the other partners join in and request the order of approval, p. 774.

Certificates of convenience and necessity — Transfer — Question of public convenience.

3. The question whether there will be public convenience and necessity to be served by the continuation of operations under a certificate is not properly raised on an application for authorization of the transfer of the certificate, p. 775.

[July 25, 1927.]

APPLICATION for authority to transfer a certificate authorizing motor carrier service and application for revocation of such certificate; revocation of certificate denied and transfer approved.

Appearances: J. G. Scott, Attorney for Henry P. Kidd, C. E. Martin and F. E. Martin, co-partners, and White Motor Express Company, a corporation; John Q. Dier, Attorney for the Colorado & Southern Railway Company; Erl H. Ellis, Attorney for the Atchison, Topeka & Santa Fe Railway Company; Thomas R. Woodrow, Attorney for the Denver & Rio Grande Western Railroad Company.

By the **Commission:** By agreement of the attorneys for the parties hereto the application for an order authorizing the transfer of the certificate in question and the application for revocation of said certificate were consolidated for hearing.

On December 18, 1924 (P.U.R.1925C, 414), the Commission made an order that the public convenience and necessity required and would require the operation of a motor vehicle carrier system for the transportation of petroleum, petroleum products, automobile accessories, and tires between the city and county of Denver and the city of Colorado Springs and intermediate points by Henry P. Kidd, C. E. Martin, and F. E. Martin co-partners, doing business under the firm name and style of White Motor Express Company.

[1] The revocation of the said certificate is sought on the ground that the holders of the certificate have not observed the very clear and explicit restrictions contained in said order, but, on the contrary, have been engaged in the transportation of all kinds of freight over the said route. The certificate holders frankly admit that they have not restricted their business as required by the certificate and order, but allege in justification of their conduct that at about the time the certificate was granted them a number of other carriers, all of whose entire operations were and are in violation of law, began and continued such extensive operations over said route that the certificate holders were faced with the alternative, after about three months of operation under the certificate, of either going out of business entirely or widening the scope of their business temporarily in order to hold on until the operations by the other operators could be eliminated or stopped.

The evidence shows that a number of operators, particularly

the Western Transportation Company, the Mid-West Transit Company, and William John Honeyman, have been carrying freight of all kinds and classes without a shadow of authority over the route of the said certificate holders; that they were cutting into the business of the said firm to such an extent that it could not, with the restrictions imposed upon it, continue operations, and that about three months after the granting of said certificate the holders thereof branched out into the general freight business, although at all times, in spite of the fact that their competitors have had lower rates, they have maintained the rates specified in their tariffs.

The evidence further shows that in every respect, except the failure to restrict their operations as required by the certificate, the certificate holders have co-operated with the Commission, and at their own expense have done a great deal of work designed to eliminate and terminate the operations of said competitors. This work, if successful, will benefit the complaining railroads as much as or more than the certificate holders.

The failure of the operators to observe the very clear restrictions contained in the said order is indeed a most serious matter. In fact, it is much more serious than a great many other acts which have been held sufficient to warrant a revocation. (P.U.R.1922B, 239, 618; P.U.R.1922C, 4.) The certificate holders doubtless should have filed an application with the Commission stating the hard position in which they found themselves and asking, temporarily, for a widening of the scope of their authority.

One important consideration which seems to have been overlooked by the parties to the case, is the needs and requirements of the public. The original certificate was issued because of a finding that the public convenience and necessity required the operations by the applicants. If their certificate is revoked, who then will perform the service found necessary? Obviously, the competitors who have no right to carry freight of any kind would get and hold the business until such time as the Commission can stop them. There are no third parties with clean hands asking for a certificate. After a careful consideration of all the facts and circumstances, the Commission feels that in fair-

ness it is proper to state that during the period in question, the law with reference to motor vehicle carriers has been unsettled and uncertain; that throughout the state there have been operators carrying on business contrary to law, and that the Commission without a special attorney has been unable to cope effectively with the situation, in spite of generous and effective assistance rendered by the Attorney General's office.

Each case of this kind must be considered on its own particular facts, and we emphatically state that this case shall not be a precedent in any other case in which the facts are not practically identical.

The Commission is of the opinion and so finds that the public convenience and necessity does not require the revocation of the certificate granted in Application No. 293, *supra,* to the said Henry P. Kidd, C. E. Martin, and F. E. Martin.

The evidence shows that on December 30, 1926, articles of incorporation of White Motor Express Company, a corporation, were executed and that a copy thereof was filed in the office of the secretary of state of the state of Colorado on January 3, 1927; that Henry P. Kidd, C. E. Martin and F. E. Martin, co-partners on or about November 1, 1926, agreed to sell, transfer, assign, and convey to said corporation then to be organized, all of the equipment, docks, and other assets of co-partnership; that thereafter all of the physical assets of said firm were duly transferred to and have ever since been held by said corporation. Henry P. Kidd is the president and treasurer of said corporation and owns all of the outstanding shares of stock, except two qualifying shares issued to two other persons. Said Kidd is a man of experience and has reasonable financial resources.

[2] One of the objections urged by the railroad companies, who protest against the authorization of the transfer of the certificate, is that C. E. Martin and F. E. Martin, two of the co-partners, did not join in the application. However, the original application for the order of approval was signed with the firm name. C. E. Martin, the father of F. E. Martin, appeared at the hearing and stated that both he and his son join in and request the order of approval.

[3] Another objection raised is that at the present time and in the future there will be no public convenience and necessity to be served by the continuation of the operations under the certificate. As has been held before, this is a question which is not properly raised on an application for authorization of the transfer. (Re Satero, P.U.R.1926D, 296.)

The third objection is that the operators have been guilty of exceeding the authority granted them. This matter already has been considered herein.

After considering all the evidence and the objections made to the transfer, the Commission is of the opinion, and so finds, that the public convenience and necessity requires the authorization by the Commission of the transfer of the certificate granted in Application No. 293, *supra*.

COLORADO PUBLIC UTILITIES COMMISSION.

RE BILL'S SIGHTSEEING COMPANY.

[Application No. 720, Decision No. 1459.]

Certificate of convenience and necessity — Reasons for revocation — Unpaid tax — Automobiles.

An order was issued to the applicant for a certificate to operate a motor vehicle for hire, to show cause why the same should not be revoked and cancelled because of a failure to pay a tax or file monthly report of mileage traveled as provided by law (§§ 7, 10, House Bill No. 430).

[October 13, 1927.]

ORDER issued by Commission as provided by law.

By the **Commission**: Commencing August 1, 1927, and as provided in § 7 of House Bill No. 430 the above applicant is required to pay a tax to the state of Colorado. Section 10 of House Bill No. 430 provides that on or before the 10th day of the month following, the motor vehicle carrier shall certify under oath to the Commission upon forms prescribed which shall show the ton miles and passenger miles traveled by the motor vehicle carrier during the preceding month. No such report

was received from the above applicant by the Commission for the month of August 1927. Furthermore, the tax provided was due and payable by the applicant to the state for the month of August 1927 on October 10, 1927. The records of this Commission show that no tax whatever has been received for the month of August 1927. Such delinquency is a ground for the revocation by the Commission of the certificate of public convenience and necessity issued to the above applicant. The Commission is of the opinion that sufficient grounds exist for it to issue an order upon the applicant herein to show cause why the certificate issued in the above application should not be revoked and cancelled.

Note.—A similar disposition was made in the applications of: Re Clark, Application No. 877, Decision No. 1454; Re Cook, Application No. 872, Decision No. 1457; Re Fain, Application No. 910, Decision No. 1460; Re Gribble, Application No. 656, Decision No. 1456; Re Heter, Application No. 856, Decision No. 1452; Re Hubman, Application No. 926, Decision No. 1462; Re Madison, Application No. 874, Decision No. 1458; Re McGlochlin, Application No. 503, Decision No. 1443; Re Meeker-Rangely Stage Line, Application No. 730, Decision No. 1434; Re Mosman, Application No. 821, Decision No. 1444; Re Nuttall, Application No. 776, Decision No. 1451; Re Padgett, Application No. 920, Decision No. 1463; Re Parker, Application No. 862, Decision No. 1453; Re Puett, Application No. 649, Decision No. 1445; Re Rice, Application No. 845, Decision No. 1455; Re Welch, Application No. 904, Decision No. 1461; Re Will, Application No. 580, Decision No. 1442; Re Wilson, Application No. 802, Decision No. 1441, Oct. 13, 1927.

ILLINOIS COMMERCE COMMISSION.

RE ILLINOIS POWER & LIGHT CORPORATION et al.

[No. 17548.]

Security issues — Stockholding consumers — Conservative capitalization.

1. The imposition of conservative capitalization performs two-fold service to consumers of a utility who are also holders of its securities, p. 779.

P.U.R.1928A.

Accounting — Amortization of excessive purchase price — Profits — Charges to capitalization.

2. The difference between the fair value of property of a small utility absorbed by a larger one and an amount exceeding the same but authorized by the Commission in order to accomplish the purchase was not permitted to be charged to the property accounts or capitalization of the purchasing company but required to be amortized through dividends and surplus, p. 780.

Consolidation, merger, and sale — Objection to excessive purchases for policy — Electricity.

Discussion of the effect of absorption of small utility property at figures in excess of real value on the rates of purchasing utility, p. 779.

[November 10, 1927.]

APPLICATION for the approval of purchase and sale of an electric light system and for certificate of convenience and necessity to the purchaser to operate same; both applications approved.

By the **Commission:** On August 1, 1927, joint application having been made to the Illinois Commerce Commission by the Illinois Power & Light Corporation and the Maroa Electric Light Company for the consent and approval of the Commission to the purchase by the former and the sale by the latter of the electric utility property located in the city of Maroa, Macon county, and the Illinois Power & Light Corporation in said joint application having applied to the Commission for a certificate of convenience and necessity covering the operation of said property, and a hearing having been held upon said application and the petitioners having presented their evidence in support thereof, and the matter having been duly submitted to the Commission for disposition, it appears

That the Illinois Power & Light Corporation and the Maroa Electric Light Company, the petitioners herein, are corporations duly organized and existing under and by virtue of the laws of the state of Illinois and that they are public utilities subject to the jurisdiction of this Commission; that said Illinois Power & Light Corporation is engaged in the business of furnishing electric utility service in diverse municipalities and places in the state of Illinois and is duly authorized by its articles of incorporation so to do; that said Maroa Electric Light

Company which has its principal office in the city of Maroa, Macon county, Illinois, owns and operates an electric utility in said city of Maroa and is duly authorized by its articles of incorporation so to do; that said Maroa Electric Light Company is the only public utility rendering electric service in the said city of Maroa and the joint petitioners represent that it is to the best interests of the patrons of said Maroa Electric Light Company and is necessary to the business and welfare of the public of said community that its property be sold to and operated by said Illinois Power & Light Corporation; that the operation of said property by the Illinois Power & Light Corporation would result in increased facilities for serving the public of said community and that said Illinois Power & Light Corporation proposes to continue the rates for service now in effect in said city; that said Illinois Power & Light Corporation has agreed to purchase and said Maroa Electric Light Company has agreed to sell all of its electric utility property, including all assets, rights and privileges, as a going concern, for the consideration of $60,000, subject to certain adjustments relative to materials and supplies, insurance and taxes at time of transfer, all of which adjustments are set forth in an agreement between the contracting parties dated July 3, 1927, which agreement has been duly submitted in the record in this case.

It further appears that the reproduction cost new and the present value of this property from an inventory prepared by the firm of Lucas and Luick, engineers of Chicago, are $36,073 and $22,713, respectively. These figures include overhead expenses of 20 per cent.

A further examination discloses that certain property enumerated in the record herein is no longer used by the Maroa Electric Light Company and has not been used nor maintained by said company since some time during the year 1913. This property, which is the generating plant equipment, has been given a reproduction cost valuation of $8,150 and a present value of $700 by the engineers for joint petitioners. It is evident that the above generating plant equipment does not now nor ever can serve its original usefulness and consequently has little but scrap value except as it may fit into a theoretical re-

production cost valuation. If the present value of this equipment as determined by witness for the petitioners were added to the reproduction cost new of the used and useful property we would have a total of $27,132 instead of $36,073, with a present value for all the property of $22,713. If a reasonable allowance were made for going value and all other intangible elements of value, it would appear to the Commission that $35,000 is a maximum figure for the purposes of purchase and sale.

The Commission is cognizant of the fact that the purchaser may feel warranted in the payment of an amount in excess of the physical valuation of a property and that such an amount has no direct bearing on the value of the property for rate-making purposes. It may be evident to the prospective purchaser that the possibilities of developing a given property are beyond that realized by present owners or operators and that economies in operation may be effected which will increase the net return upon a property. The Commission's records disclose however that the quality of service rendered by the Maroa Electric Light Company has not been up to the standard which should reasonably be expected of a utility of similar size and similarly situated. To bring this property to a physical state where reasonably good service can be rendered will require the expenditure of further sums of money, portions of which amounts may be properly charged to capital account.

A public utility buys additional property because it expects to make a profit out of the transaction. If a small utility property is absorbed by a larger corporation at a figure in excess of its real value, there would be no appreciable effect on the consumers as a whole because the burden of excessive capitalization would be spread over so large a group of consumers. If, however, this practice were allowed to be continuously employed, the ultimate effect would be evident in rates in excess of those which are just and reasonable.

[1] In case one public utility is purchased by another the Illinois Commerce Commission law provides, among other things, that the Commission shall impose such conditions as will protect the interests of the minority and preferred stockholders. Under the present method of financing most public utilities have

a wide distribution of securities among consumers and the imposition of conservative capitalization performs a two-fold service to those ultimately affected.

[2] The Commission in this case will authorize the purchase and sale of the property at the amount prayed for in the petition but will not permit the inclusion of the entire purchase price in the property accounts and the capitalization of the purchasing utility but will require the purchaser to amortize through surplus or stockholders' profits the difference between a fair value for purposes of purchase and sale and the amount at which purchase is authorized.

The Commission, having considered the application, the evidence presented in support thereof, and being fully advised in the premises, is of the opinion and finds:

(1) That a fair and reasonable value for the purposes of purchase and sale and capitalization of the property of the Maroa Electric Light Company properties to be transferred is $35,000;

(2) That the public will be convenienced by the transfer herein contemplated;

(3) That the applicants should be authorized to sell and purchase the property of the Maroa Electric Light Company for $60,000, subject to the terms and conditions hereinafter set forth; and

(4) That the difference between a fair value above found and the amount authorized for the purchase and sale shall be amortized from the surplus or stockholders' profits of the Illinois Power & Light Corporation in such a manner as it may deem advisable but that no portion of such excess should be charged to the operating expenses of the said company nor to its capital accounts.

MICHIGAN PUBLIC UTILITIES COMMISSION.

RE FRANK F. ROGERS.

[D-2218.]

Crossings — Elimination — Jurisdiction of Commission.

1. The Commission has statutory power (under Act No. 114 of Public Acts, 1925) to determine the necessity and means for a grade separation as well as to apportion the cost thereof, where the proposed construction is beyond the corporate limits of a city having a population of over 6000, p. 783.

Crossings — Benefit to railroad — In general.

2. Grade separations, in general, are of great practical value to the railroads, relieving them from penalties, cost of crossing protection, delays in movements, and possible damages in accident cases, p. 784.

[November 7, 1927.]

PETITION of state highway commissioner for a separation of grades; approved.

By the **Commission:** This proceeding has been brought by the state highway commissioner, under Act No. 114 of the Public Acts of 1925, doubtless under the theory that the grade separation structure will pass over the right of way and tracks of the Ann Arbor Railroad at a point outside of the present city limits of the city of Ann Arbor. The petition sets forth, *inter alia,* that the said state highway commissioner "has caused to be located and has partially constructed an outer-belt line or cut-off, now known as State Line No. 111, carrying the through traffic over State Trunk Line Highway No. 17, the leading through highway route from Detroit to Chicago, southerly around the city of Ann Arbor, thus avoiding the narrow and congested streets and heavy local traffic on said highway through the said city, this cut-off being deemed by petitioner and by the U. S. Bureau of Public Roads as a public necessity." Maps showing the relocated route accompanying the petition. The new route will cross the tracks and right of way of the said Ann Arbor Railroad a short distance south of Ferry Field, which intersection is also just south and west of the present city limits of the city of Ann Arbor. Part of the proposed highway will pass through a portion of the city, namely from the center line

of State street to Golden avenue, and the entire route will be available for local traffic, as a part of a plan for an outer-belt line in and around the city. This relocated route is listed for Federal Aid and has been designated as a State Trunk Line Highway. After due consideration the matter was brought on for hearing before the Commission on the 24th day of August, 1926, wherein the state and the said railroad were represented by counsel and other representatives; and proofs were taken in behalf of the petitioner and of the railroad company. Briefs have also been filed upon the points of law involved.

Briefly, the proofs show that the state highway commissioner, who has jurisdiction over the construction of the proposed highway, desires to cross the tracks of the railroad by means of an overhead grade separation, the easterly approach of which will reach into the city of Ann Arbor to a point a little east of White street, involving, of necessity, a further overhead separation across State street, at which point the grading of the highway would be too high to cross that street on a feasible level with its existing surface. Were it not for the fact that State street is so close to the Ann Arbor Railroad at this point, the easterly approach could be considerably shortened, but would still be partly within the city east of the center line of State street, involving a portion of Rose street. Were it not for the railroad, the new highway could intersect the streets of Ann Arbor at grade, thus avoiding the necessity of an overhead highway at State street.

As bearing on the necessity of separating the grades at the railroad tracks, it was shown that the vehicular traffic over M-17, at Ann Arbor, is at all times very heavy, exceeding 6000 automotive vehicles per day, and that the train passages over the Ann Arbor Railroad at this point are about 12 per day. Upon opening the relocated highway, it is estimated that it will carry practically all through traffic, and we think this forecast is reliable as based upon experience. The dangers attending such a crossing, if at level grades, are, in our opinion, not open to dispute, where the traffic on the highway runs to such high figures, and the thing is as hazardous to life and property carried by the railroad as to those borne by the highway. From this standpoint

alone, to say nothing of public convenience, we are of the opinion, and so find, that, if the highway is opened as proposed, the public safety requires that the grades between the highway and the railroad be separated. The public convenience, to be properly served and respected, also makes such a separation of grades necessary.

Estimates of the cost of the proposed grade separation have been filed and proofs sustaining such estimates submitted by petitioner, together with general plans for the structure itself. (Exhibits A. B. C.)

Since the hearing, the state highway commissioner has also filed with this Commission detailed plans for the structure, Exhibit D, in accordance with a request made at the hearing. From our examination of these plans, both general and detail, we find them to be feasible and reasonable as to the cost involved, and that they ought to be approved by this Commission.

Important questions of law and fact were raised by the railroad company, which are here stated:

1. That Act No. 114 of the Public Acts of 1925, has no application to this proceeding, and the Commission has no jurisdiction over it.

2. That the proposed separation is not, in fact, necessary.

3. That there is no substantial benefit to the Ann Arbor Railroad Company.

[1] Upon the first question thus raised, we are of the opinion that the proceeding has been properly brought under Act No. 114, in so far as the main proposition is concerned, viz.: separating grades lying outside a city having a population over 6000, as contemplated in the act in question. Our jurisdiction, however, clearly ends at the city limits, so that this Commission cannot determine the questions involved within the city of Ann Arbor in the present proceedings.

What we conceive the Commission has power to do in this proceeding is, (1) to determine the necessity of the grade separation; and (2) to determine the question of how the work should be accomplished; and (3) fix the apportionment of the cost of that part of the separation project lying without the city of Ann Arbor, and as to which Act No. 114 applies.

Upon the second question, we think the proofs sustain the petition, as already indicated in this opinion, viz.: that the grade separation is a public necessity and ought to be permitted by this Commission.

[2] Upon the third question, we are clearly of the opinion that the plans proposed by the state highway commissioner are feasible and reasonable, public convenience and safety considered; and that the width and other features of the structure, although looking to the future somewhat, are neither extravagant nor over-adequate when we consider the permanent uses of such a structure and the rapidity with which such structures become inadequate under modern conditions of traffic. We cannot say just which party will benefit the more by this separation, but it is certain that grade separations in general are of very great practical value to the railroads, relieving them of penalties, cost of crossing protection, delays in train movements, and possible responses to damages in accident cases. Act No. 114 P. A. 1925, declares the public policy as to participation in the expenses of construction, fixing it on a fifty-fifty basis as between the railroad and the general public, and in so far as this proceeding gives this Commission jurisdiction, we are of the opinion that the cost and expense of construction, that portion of this particular grade separation west of the west line of State street, ought to be borne equally by the state and the railroad company excepting the item of paving of said highway, and also excepting any portion of the structure within State street which extends west of the westerly line of State street.

As to the cost of the remainder of the project, and how it shall be borne, we do not believe that this Commission can determine those questions under Act No. 114, nor in these proceedings.

In conclusion, we therefore, find that the entire cost of this particular grade separation west of the west line of State street shall be borne equally by the state and the railroad company, except the item of paving of said highway and also excepting any portion of the structure within State street which extends west of the westerly line of State street.

MINNESOTA RAILROAD AND WAREHOUSE COMMISSION.

H. P. MOEDE et al.
v.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

[A-3376-96.]

Crossings — Jurisdiction of Commission — Over establishment of grade crossings — Court action.

The action of a district county court in judicially laying out a highway which incidentally involves the establishment of a crossing at grade does not in any way affect the jurisdiction of the Commission under a statute (§ 4663, General Statutes 1923) providing that no highway should be laid out over a railroad so as to cause a crossing at grade without the approval of the Commission.

[October 15, 1927.]

PETITION requesting permission to establish a crossing at grade over tracks of a railroad; denied.

By the **Commission**: Petition of H. P. Moede and others requesting permission to cross the tracks of the above named carrier at grade, with a highway in process of judicial establishment, said crossing to be situate on the section line between sections 28 and 29, Township 115, Range 31, approximately 1½ miles east of Buffalo Lake, Renville county, Minnesota, was duly filed with the Commission on or about August 14, 1926. Thereafter, subsequent to engineering investigation, the petition was informally declined, and exception to such informal declination resulted in hearing before the Commission, after due notice given, at Buffalo Lake, Minnesota, October 15, 1926, at 10:30 o'clock in the forenoon. At said hearing there appeared Mr. O. S. Vesta, attorney, Mr. Frank Murray, attorney, and Mr. J. J. Baker, county attorney, for petitioners; Mr. L. W. Martin, attorney for Preston Lake township, and Mr. A. D. Emery, assistant district engineer, Chicago, Milwaukee & St. Paul Railway Company, objectors.

The evidence presented at said hearing disclosed that there existed some difference of opinion as to the necessity for the one

and one-fourth mile of highway proposed to be constructed, for which the petitioned crossing is desired, and that the matter of establishing such portion of the highway was before the district court of Renville county for judicial determination; and it was testified,

That the proposed highway is favored and the proposed crossing desired as a means of providing a more direct north and south highway to certain lakes north of the railroad tracks, and for a more direct route to the so-called Twin City Short Cut, a highway situate about twelve miles north of State Highway No. 12. That the proposed road will also connect State Highways Nos. 12 and 14, and that its construction will better serve the whole territory than the present north and south roads approximately one-half mile east and approximately one mile west, respectively. That the proposed road will, when established, become a part of the state trunk highway, and that the installation of the proposed crossing will permit of the elimination of two private crossings now located in the immediate vicinity thereof, thereby not increasing the danger of crossing the railroad tracks at grade. That the proposed road and crossing are deemed necessary and that the establishment of State Highway No. 12 on the south side of the tracks, which has practically been decided upon by the State Highway Commission, will in nowise detract from such necessity and convenience of the proposed road and crossing.

The objector Preston township contends the new road unnecessary; that the land over which it must be constructed is of a boggy nature and will require heavy maintenance costs which Preston township will be called on to expend, thereby creating an unnecessary burden on the said township, and that the present north and south roads one-half mile east and one mile west of the proposed road, are adequate to serve the needs of the public at this time. That the railroad tracks at the proposed point of crossing are approximately five feet above the present grade of Trunk Highway No. 12, and that with the establishment of said Trunk Highway No. 12 on the south side of the railroad tracks would entail an approach grade of approximately 7 per cent which would be deemed dangerous in not pre-

senting sufficient view of approaching trains by occupants of vehicles passing over the proposed crossing.

The railway company objects to the establishment of the proposed crossing for the reason that it will add a grade crossing, and that the proposed elimination of the two farm crossings in the nearby vicinity will not detract from the danger of the proposed crossing. That there are two present crossings at grade within a mile of the proposed location, one for the north and south road one-half mile east, and the other for the north and south road one mile west. That the high speed coast trains of the company pass over the tracks involved, and that the necessity for the crossing is not commensurate with the danger incident to it.

The present and proposed crossings are outlined on the blueprint attached hereto and made a part hereof, as is also that portion of the proposed road involved.

The Commission is advised that the highway for which the crossing herein involved is desired, has been judicially laid out by the district court of Renville county, Minnesota, under order filed by the said court on September 3, 1927. It does not understand, however, that such action by the court in any way affects the jurisdiction of the Commission under § 4663, Gen. Stat. 1923, viz.:

". . . Provided that no highway shall hereafter be laid out over any railroad so as to cross the same at grade until such crossing has been approved by the Railroad and Warehouse Commission."

After a careful review of the evidence presented, and being fully advised in the premises, the Commission finds the installation of a grade crossing at the point marked "X" on the attached blueprint, will result in a crossing dangerous to life and property. The railroad tracks at the present time are approximately five feet above the present grade of Trunk Highway No. 12, and the establishment of the said state highway on the south side of the tracks would increase the approach grade to the crossing to approximately 7 per cent. Traffic on Trunk Highway No. 12 is a fast moving traffic, and a grade of either 5 or 7 per cent to or from said highway and the railroad tracks would be dangerous as

between vehicles themselves on the two highways, and between vehicles and the high speed trains operating over the crossing.

It is therefore *ordered,* that the petition of H. P. Moede and others requesting permission to cross the tracks of the Chicago, Milwaukee & St. Paul Railway Company, H. E. Byram, Mark W. Potter, and Edward J. Brundage, Receivers, at grade on the section line between Sections 28 and 29, Township 115, Range 31, approximately 1½ miles east of Buffalo Lake, Renville county, Minnesota, be and the same is hereby denied.

MISSOURI PUBLIC SERVICE COMMISSION.

STODDARD COUNTY
v.
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY.

[Case No. 5236.]

Crossings — Relative jurisdiction of Commission and county court.

1. The Public Service Commission has no authority to disturb the finding of a county court with respect to the public necessity of a grade crossing, but it is authorized to determine the manner, designate the point, and apportion the incident expense of such crossing, p. 791.

Crossings — Jurisdiction of Commission — Private crossings.

2. The Commission has no authority over private crossings, and in the absence of a showing that certain grade crossings are public, the Commission is not justified in ordering them closed, p. 791.

[September 15, 1927.]

APPLICATION of county for establishment of highway crossing at grade over railroad right-of-way; approved.

Ing, Commissioner:

I.

On May 25, 1927, Stoddard county, Missouri, by its county court, filed with this Commission an application for an order establishing a crossing of a certain county highway in Stoddard county, over the right-of-way and track of the St. Louis-San Francisco Railway Company. The application alleges that on

December 30, 1926, the county court of Stoddard county, Missouri, duly established a public road in the municipal township of Duck Creek beginning at a point on the section line where the same crosses the public road between sections 18 and 19, Township 26, Range 8 East; running thence west along the section line to the southwest corner of Section 18, Township 26, Range 8, in Stoddard county, Missouri, said new highway intersecting the right-of-way of the defendant railroad at a point between mile posts 180 and 181. The applicant states that it is desired to have a crossing established at grade at the point of intersection of said highway with the right-of-way of defendant company; that said proposed crossing is not a dangerous or hazardous one and is of public necessity and convenience.

The defendant St. Louis-San Francisco Railway Company in due time filed an answer to the application herein. The answer, among other things, alleges that the applicant has no power or authority to establish a public road across the right-of-way and track of the defendant, and that if applicant has attempted to establish said public road across said right-of-way and track of the defendant such action is wholly void and of no force or effect. The defendant further alleges that there is no public necessity for the establishment of the proposed crossing, that said crossing would not serve the general public but, on the contrary, would serve only one or two individuals, and that the attempt to establish said crossing is for the purpose of providing a crossing for one or two individuals under the guise of establishing a public crossing.

The defendant also alleges that there is an existing public crossing over the defendant's right-of-way and track approximately 2,160 feet north of the proposed crossing, and another public crossing approximately 4,100 feet south of said proposed crossing; that every additional public crossing at grade over defendant's railroad track increases the hazard and danger to the traveling public and employees of the defendant; that the cost of constructing said proposed crossing is estimated at $321.

Defendant states that it is willing that the Commission make the order establishing the proposed crossing upon the express conditions and not otherwise that the entire cost of installing

such public crossing be imposed upon and borne by applicant, and that the Commission require, as a condition precedent to giving its consent to the construction of said crossing, that one or the other of said existing public crossings across said defendant's tracks be ordered abandoned and closed.

This case was heard by a member of the Commission at Dexter, Missouri, on the 10th day of August, 1927, at which time and place both applicant and defendant were represented by counsel and participated in the hearing.

II.

The testimony produced at the hearing supports substantially the allegations of the application. The road, for which a crossing is sought over the defendant's railroad track, was ordered open by the county court of Stoddard county, Missouri, on December 30, 1926. This road is two and one-quarter miles long and connects two existing county roads, one being south of the railroad of the defendant company and the other north of said railroad. The land is level at and in the vicinity of the proposed crossing, and the railroad track is straight for a considerable distance in each direction. The railroad runs in a northwesterly and southeasterly direction, and there is a clear vision for approximately a mile southwest of the crossing and for approximately two miles northeast of the crossing. There are no obstructions to vision. There is a crossing over the track of the defendant railroad company 2,160 feet north of the proposed crossing. This crossing is at a place known as Star Switch and is closed by a gate on one side of the crossing. There is another crossing 4,095 feet south of the proposed crossing, which also has a gate on one side. There was some controversy as to whether these two crossings are public or private crossings. There was no testimony that they are extensively used and no definite testimony that they are purely private.

The testimony shows that the railroad track at the point of the proposed crossing is three or four feet above the surrounding land. It is about two miles in either direction from the point of the proposed crossing to an open public crossing; that is, a crossing that has no gate and is used by the public. The defend-

ant asks the Commission to order one of the crossings immediately next to the proposed crossing closed and abandoned. The defendant estimated the cost of installing the proposed crossing at $321. Defendant offered testimony to show that there is no public necessity for the proposed crossing.

The defendant offered in evidence a blue print showing the location of the proposed crossing and of the two existing crossings nearest to said proposed crossing, said blue print being marked as defendant's Exhibit No. 1.

III.

[1] As to the necessity or desirability of the proposed crossing, this Commission has no concern. The county court of Stoddard county, which has a right to establish roads in said county, has found that the public highway referred to herein is one of public necessity and has ordered it opened to the public. It has also found that a crossing over the track of the defendant railway company is necessary in order to make it possible to use said road. The Public Service Commission has no authority to disturb the finding of the county court in that respect, but it is authorized to determine the manner of crossing, designate the particular point of crossing, and apportion the expense incident to establishing the crossing.

It may be true, as alleged by defendant, that there would not be many people using the proposed crossing. The testimony does show, however, that persons living in the direction of the town of Wappapello, and persons living in the immediate vicinity of the proposed crossing will use it when established.

[2] There was no showing made in regard to the hazard of the two existing crossings nearest the proposed crossing. While it is true that every grade crossing is hazardous, in the sense that there is a possibility of injury being inflicted upon anything going or being upon said crossing, in this case where the crossings are protected by gates, such hazard is not great as compared with the average railroad grade crossing. The testimony is to the effect that these two existing crossings are not open to the public, anl the proof as a whole fails to show that they are, in fact, public crossings. This Commission has no authority over private

crossings, and in the absence of a showing that these crossings are public, the Commission would not be justified in making an order closing them.

The Commission finds that the evidence in this case is insufficient to justify an order closing or abandoning either of said existing crossings.

The Commission, after a careful consideration of all the facts in this case, is of the opinion that said proposed crossing should be established; that the particular point of crossing should be that as prayed for by applicant herein and as shown on the blue print filed by the defendant in this cause, and that the expense of installing said crossing should be borne equally by applicant and defendant.

An order in accordance with the views herein expressed will be issued.

All concur.

ORDER.

This cause being at issue upon application and answer on file and having been duly heard and submitted by the parties, and full investigation of all matters and things involved having been had, and the Commission having on the date hereof made and filed its report herein,

Now, upon the evidence in this case, and after due deliberation, it is:

Ordered: 1. That the St. Louis-San Francisco Railway Company and Stoddard County, Missouri, be and they are hereby required to establish a grade crossing over and across the right-of-way and track of the said St. Louis-San Francisco Railway Company at a point in Duck Creek township between mile posts 180 and 181 where the county road intersects the right-of-way and track of said railway company, as is more fully shown by blue print filed by defendant in this cause, and marked Exhibit 1, and that the cost of constructing said crossing shall be divided equally between applicant and defendant.

Ordered: 2. That the actual work of installing said crossing shall be done and performed by the defendant St. Louis-San

Francisco Railway Company, which work shall be completed within sixty days after the receipt by said railway company of the sum of $160.50 from Stoddard county, Missouri, or someone acting for or instead of said county.

Ordered: 3. That the Commission fully retain jurisdiction of the subject matter and parties to this proceeding on the testimony now before the Commission for the purpose of making such other or further orders as to the Commission may seem just and proper.

Ordered: 4. That the defendant railway company be and the same is hereby required to keep a true and accurate account of all expenses incurred by it in the construction of said proposed crossing, and that it file with the county court of Stoddard county, Missouri, on the completion of said crossing a copy of said expense account. If the actual cost of constructing said crossing shall be less than the estimated cost, said defendant railway company shall refund to said Stoddard county, or to the person advancing said money for or instead of said county, whatever sum remains in its hands heretofore paid to it and not used in the construction of said crossing.

Ordered: 5. That this order shall take effect ten days after this date, and that the secretary of the Commission shall forthwith serve certified copies of this report and order upon the parties hereto and that said interested parties shall notify the Commission on or before the effective date of this order in the manner prescribed by § 25 of the Public Service Commission Law whether the terms of this order are accepted and will be obeyed.

MISSOURI PUBLIC SERVICE COMMISSION.

RE J. W. WORRELL.

[Case No. 5325.]

Commissions — Jurisdiction over motor carriers — Irregular operation.

1. The jurisdiction over motor carriers given to the Commission by an act (Motor Bus Law 1927, § 2) defining a motor carrier as one

who "operates between fixed termini over a regular route" does not extend the Commission's authority to carriers operating over irregular routes, not between fixed termini, p. 796.

Certificates of convenience and necessity — When certificate is required — Irregular operation.

2. The Commission cannot grant authority to a motor utility to operate over any and all routes within the state regardless of existing facilities where a provision of statutes (Motor Bus Law 1927, §§ 4, 6) specifically provides that a certificate shall not be required for occasional service over irregular routes, p. 796.

Certificates of convenience and necessity — When certificate is required — Irregular routes.

3. The difference between a regular and an irregular route is that the former is between fixed termini and the latter is not, but may begin anywhere and extend anywhere within the state, p. 796.

Commissions — Jurisdiction over payment of license tax — Motor busses.

4. The Commission has no authority over the levying or collecting of a license tax where an act (Motor Bus Regulation Act of 1927, § 6) provides for its payment to the State Treasurer as well as the conditions under which it shall be paid, p. 797.

Automobiles — Irregular operator — Liability insurance.

5. A motor carrier operating over an irregular route cannot be required to file liability insurance under a law (§ 7, Motor Bus Regulation Act, 1927) providing that such insurance should be filed as a condition precedent to the issuance of a certificate where a certificate is unnecessary for such operation, p. 797.

[November 16, 1927.]

APPLICATION for certificate of convenience and necessity; denied for lack of jurisdiction.

Ing, Commissioner:

Statement:

On July 18, 1927, J. W. Worrell of Springfield, Missouri, hereinafter referred to as the Applicant, filed with this Commission an application for a certificate of convenience and necessity to render occasional service as a motor carrier over irregular routes, and not between fixed termini. The Applicant alleges that his principal office is No. 43 Elks Arcade Building, Springfield, Missouri; that he is the sole owner of the line for which a certificate of convenience and necessity is asked; that he is and has been for some years past engaged in hauling parties who charter his bus for trips to various sections of the state;

that such parties use his bus when they desire to make trips over which the railroad connections are bad, or if the trip by bus is more pleasant, or much shorter; that approximately 75 per cent of Applicant's business consists in carrying athletic teams, Glee Clubs, etc., from the city of Springfield to various other college towns in Missouri, and the remainder of such business is mainly carrying parties to various sections of the Ozarks on pleasure outings and picnics.

This case was heard by the Commission at the Commission's hearing room at Jefferson City, Missouri, on the 8th day of August, 1927.

Facts:

The testimony in this case substantiates the allegations of the application. The Applicant testified that he has been engaged in the operation of a 24-passenger motor bus from Springfield to surrounding towns in the state of Missouri for the last seven or eight years, and that his operations have not been regular and are not between fixed termini.

The rates charged by the Applicant depend on the journey that is being made; ordinarily a charge of 50 cents a mile is made for a parlor car. The Applicant stated, however, that usually the fare paid was reached by contract with the passengers.

The Applicant is not carrying any liability insurance.

After the hearing of this cause the Applicant filed a schedule of rates which he proposes to charge passengers taking passage in his bus, which provides for different rates, ranging from 35 cents per bus mile for parties containing from 12 to 15 passengers, to 50 cents per bus mile for parties containing from 21 to 24 passengers. The schedule also provides that parties containing less than 12 passengers shall have a rate of 30 cents per bus mile.

The majority of trips made by the Applicant are to college towns such as Maryville, Kirksville, Tarkio, Rolla, Fulton, Warrensburg, Cape Girardeau, Carthage, Bolivar, and Warrenton. The Applicant stated that his operations cover practically the entire state.

Conclusion:

[1] The question of jurisdiction will be decisive of the issues of this case. Sub-division "b" of § 1 of the Motor Bus Law of 1927 defines a motor carrier as follows:

"The term 'motor carrier' when used in this act means any person, firm, corporation, lessee, trustee, or receiver operating any motor vehicle with or without trailer or trailers attached, upon any public highway for the transportation of persons for hire between fixed termini over a regular route, whether within one city or otherwise even though there may be periodical or irregular departures from said termini or route."

The jurisdiction given to this Commission by the Motor Bus Law of 1927 is over "motor carriers," as will be found by reference to § 2 of said law. It will be noted that the statute above quoted defines a motor carrier as one who operates "between fixed termini over a regular route," and nowhere in said motor bus act is the Commission's authority extended to carriers operating over irregular routes not between fixed termini. The only references in the 1927 Motor Bus Law to what are known as irregular operators, or irregular routes, are found in §§ 4 and 6. The last sentence of § 4 of said law is as follows:

[2, 3] "Provided however, that a certificate of convenience and necessity shall not be required for occasional service over irregular routes not regularly served by motor vehicles under the provisions of this act."

It will be noted that in the above quoted part of § 4, a certificate of convenience and necessity is not necessary for occasional service over irregular routes not regularly served by motor vehicles under the provisions of the Motor Bus Law, and the jurisdiction of the Commission as provided by § 2 is not enlarged, to say the least. As the Commission understands it, the difference between a regular route and an irregular route, is that the regular route is between fixed termini and the irregular route is not, but, as is shown by the testimony in this case, the irregular route may begin anywhere and extend anywhere within the state. It appears that the Applicant in this case desires to operate over any of the roads of this state leading out of

Springfield, to any and all parts of the state, and over any and all roads, within the state, whether they are regularly served by motor carriers, under the provisions of the law, or not. This Commission cannot grant such authority.

[4] The other reference in the Motor Bus Regulation Act of 1927, to irregular routes, that contained in § 6, is as follows:

"There shall hereafter be levied and collected in addition to the taxes now provided for by law upon each motor vehicle used as a carrier of passengers for hire over and along irregular routes, and not between fixed termini, a tax equal to one-half of the tax by this section imposed upon motor vehicles of the same capacity used in the transportation of passengers for hire as common carriers along regular routes between fixed termini."

Just what this Commission has to do with that provision does not appear. The license tax provided for must be paid to the state treasurer. The Commission does not have anything to do with it.

The Applicant in this case carries no liability insurance, but he stated at the hearing that he is willing to provide the necessary liability insurance if the certificate should be granted by the Commission.

[5] Section 7 of the Motors Bus Regulation Act of 1927 provides: "No certificate of convenience and necessity shall be issued by the Public Service Commission to any motor carrier until and after such motor carrier shall have filed with, and the same has been approved by the Commission of this state, a liability insurance policy," etc. There is no provision for the filing of an insurance policy other than that contained in § 7, which makes the filing of the insurance policy a condition precedent to the granting of a certificate of convenience and necessity, and since the Commission is not authorized to issue a certificate of convenience and necessity to carriers operating over routes not between fixed termini, there appears to be no authority for the Commission to require the filing of a liability insurance policy or bond by the carrier operating over an irregular route.

After a careful consideration of all the facts developed in this case the Commission is of the opinion that in the absence of

statutory authority authorizing it to grant certificates of convenience and necessity to motor carriers operating over irregular routes, not between fixed termini, the prayer of the Applicant should be denied and the application dismissed.

Brown, Chairman, Calfee and Porter, Commissioners, concur; Hutchison, Commissioner, absent.

MONTANA PUBLIC SERVICE COMMISSION.

A. W. MERRIFIELD et al.

v.

MOUNTAIN STATES POWER COMPANY.

[Docket No. 959, Report & Order No. 1483.]

Service — Extension — Facts of particular case.

1. Each case in which an application for an extension of service is considered must be determined upon its own facts, when the subject of extensions has not been fully developed by appropriate investigation and fundamental regulations established, p. 801.

Service — Extensions — Electricity.

2. An electric utility must extend service within reasonable limitations to serve all in its territory who apply, p. 802.

[May 5, 1927.]

En banc. PETITION for an order requiring an electric utility to construct and install an electric power line; granted.

Appearances: A. W. Merrifield, for the petitioners; Lieutenant Governor W. S. McCormick, for certain interveners; H. H. Cleland, Z. E. Merrill, and W. B. MacDonald, for the defendant.

By the **Commission:** The Mountain States Power Company is a public utility rendering electric service in the cities of Kalispell, Whitefish and in the towns of Columbia Falls and Bigfork, all in Flathead county. At the latter point its hydroelectric generating unit is located and transmission lines run in a general northwesterly direction from Bigfork to the communities named. The first city entered is Kalispell about 11 miles north of the north shore of Flathead lake. Petitioners are persons

residing along the west shore of Flathead lake, a body of inland water extending for about twenty-seven miles from north to south. For some years they have endeavored to persuade the company to build a line to serve the western shore of the lake and, while one or two surveys and studies have been made of the project, the parties involved have been unable to reach an agreement and the instant proceeding is the result. Two hearings have been had. At the conclusion of the first hearing it was agreed that petitioners and defendant would continue further informal negotiations. Their further effort, however, ended without accomplishment. The entire record was submitted to the Commission at the conclusion of the final hearing with the understanding that we are to exercise determinative authority in the premises on the evidence in the consolidated record. No question of jurisdiction has been raised.

The extensive record may be summarized for the purpose of this report and order. A survey by petitioners of the territory involved along the west shore between Somers and the south end of the line indicates that in the seven mile distance 143 persons will subscribe for electric service. 67 of these reside in lake shore homes occupied the year round, while the remainder sojourn in summer homes occupied only during the summer months or for part of the year. All of these persons will install lighting fixtures. In addition a new survey of potential power users discloses the following demand: West lake shore 45 motor ranging from one-fourth to eight horse power capacity; school addition, nine motors ranging from one-fourth to three horse power capacity; Rouselle school to Norman-Smith store thirteen motors ranging from one-fourth to fifteen horse power capacity. All of these areas are within the project. In addition there are twenty-one requests for ranges along the west shore; three requests for ranges in the school addition and seven requests for ranges in the territory from the Rouselle school to the Norman-Smith store. The amount of power which will be used for any purpose is naturally speculative at this time. Petitioners refuse to make any money contribution, but agree to construct their own laterals in excess of 300 feet off the main line. Petitioners have made no estimates of costs of construction, of the necessary

capital investment or probable returns thereon. In this respect they content themselves, *arguendo,* with pointing out that the company's figures indicate the venture will be profitable.

The Mountain States Power Company is a Delaware corporation, duly admitted to do an intrastate business in Montana. Its articles of incorporation contain extensive grants of power from the state of its origin; it possesses not only the right to sell electric energy as a public utility, but to engage in other forms of public utility enterprises. Specifically, its charter permits it to conduct its business and carry out the purposes of its organization "in any of the states, territories, or dependencies of the United States." Within the state of Montana it is now operating a plant at Baker in the southeastern corner of the state, an electric plant at Forsyth, in the south central part of the state and the plant at Bigfork, serving the Flathead county communities above enumerated. The Flathead county communities are more than seven hundred miles distant from Baker. We do not mean to indicate that the company, by its entry into Montana or by the service now rendered it is obligated to furnish service anywhere within the state, but from a territorial standpoint it seems only fair to conclude from its actions a positive and unequivocal profession of service in what may be called the Kalispell-Flathead lake neighborhood. Additionally it has undertaken rural service in these localities, having already constructed a line some seven or eight miles long into the farming neighborhood northwest of Kalispell.

The company estimates the cost of the extension as follows: Line $20,384.76; substation $2,290, and overheads figured at 18 per cent, $4,081.45, or at a total cost for new construction and installation of $26,756.21. To this the company adds on a recognized basis of apportionment the sum of $12,132 in round numbers, which represents that portion of the central generating plant assigned to the proposed operation. This brings the estimated investment in the extension to $38,888. Various exhibits bearing upon estimated revenues from the extension and estimated costs of operation, including depreciation figured at 4 per cent, were presented to show the results if the company were required to make the total investment in the extension, and

if the consumers were required to expend amounts varying from $50 to $121 per customer. All of these exhibits, however, are based on the assumption that the 143 prospective customers would contribute a minimum of $1 per month (the tariff minimum charge) or $12 per year per customer, or a total gross operating revenue per annum of $1,716. The company claims that this estimate is conservative because its experience is that from 30 to 40 per cent of prospective customers fail to make written contract for service when the time comes for definite action.

We are of the opinion that the estimate of revenues is altogether too low even when account is taken of the decrease between prospective customers and actual subscribers and of the seasonal residence of many customers. It assumes only a nominal consumption, while the record shows a substantial load, more imminent than speculative. Additionally, there is no warrant for assuming that the Commission would establish a minimum of $1 for customers on the projected line. Nor do the prospective customers contend for any such rate. They recognize, as we must, that all of the elements which enter into the construction of a proper minimum charge must be considerably higher for the operation of a rural line in distinction to the operation of lines in urban centers. Our studies lead us to conclude that a minimum charge of $2 for customers taking energy from the line during twelve months of the year and a minium charge of $2.50 for customers taking energy from the line for any period less than twelve months would be proper. At least all available data indicate that the line should commence operation with such minima established.

Accepting the company's investment figure, and also its figure for gross operating expense, $1,988 per annum it appears that a minimum of $2 per month from 143 customers would produce a net return of 4.26 per cent on $38,888; that a minimum of $2.25 would produce a net return of 5.53 per cent; and a minimum of $2.50 a net return of 6.80 per cent. None of these estimates takes cognizance of the future power load and some considerable consumption of power is certain.

[1] In 1926 we approved certain regulations governing rural

extensions of this company. In the instant proceeding, however, the company has waived in its own evidence a strict adherence to these regulations and in consequence of its own waiver we see no reason for giving such regulations any force or effect in this case. The subject of rural extensions for public utilities has not received careful consideration in Montana up to this time. Undoubtedly the time is not far off when the subject must be developed by appropriate investigation and some fundamental regulations established, but in the meantime it must be understood that each case is to be determined upon its own facts and the decision herein is to furnish no precedent in other cases—and of course it goes without saying that fair rates cannot be promulgated until after actual operation of the extension for a period of at least one year. It is the principal characteristic of Commission regulation of rates that response may be made promptly to varying conditions and new circumstances.

[2] We have given this case unusual consideration owing to the very important questions presented. We fully appreciate the limitations or the exercise of power which enforces the expenditure of the money of the utility in such a way as amounts to a taking of private property. We appreciate that we may not assume the role of managers and require such property to be used in a service to which the owner has not voluntarily dedicated it. (Atchison, T. & S. F. R. Co. v. Railroad Commission, 173 Cal. 577, P.U.R.1917B, 336, 160 Pac. 828, 2 A.L.R. 975; Interstate Commerce Commission v. Chicago, G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493.) But since it seems certain that the territory is within defendants' profession of service it is defendants' duty within reasonable limitations to serve all in such territory who apply. (People ex rel. New York & Q. Gas Co. v. McCall, 245 U. S. 345, 62 L. ed. 337, P.U.R.1918A, 792, 38 Sup. Ct. Rep. 122; Lukrawka v. Spring Valley Water Co. 169 Cal. 318, P.U.R.1915B, 331, 146 Pac. 640, Ann. Cas. 1916D, 277; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; People ex rel. Woodhaven Gas Light Co. v. Deehan, 153 N. Y. 528, 47 N E 787.)

In this connection, the language of Mr. Justice Clarke in

People ex rel. New York & Q. Gas Co. v. McCall, *supra,* at p. 797 of P.U.R.1918A, is apposite:

"Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve, and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render."

An appropriate order will be entered.

ORDER.

At a session of the Public Service Commission of Montana, held in its office in the Capitol Building in Helena on Thursday the 5th day of May, 1927, present Chairman Boyle and Commissioners Young and Dennis, there came before the Commission for final and appropriate action the case of Merrifield v. Mountain States Power Co. Docket No. 959, and it appearing that a thorough investigation has been had including public hearing whereat all persons interested appeared, or had opportunity to appear, and now the Commission being fully advised in the premises;

It is therefore *ordered,* that the petition herein shall be and it is hereby granted and the said Mountain States Power Company is hereby ordered to construct and install for the use of petitioners and others of the public who may be served thereby, along the west shore of Flathead lake, for a distance of seven miles, (between the termini considered in this proceeding) a standard line for the furnishing of electric power in public service.

It is *further ordered,* that construction of said line shall commence not later than July 1, 1927, and proceed thereafter with reasonable diligence to conclusion; and that the following minima shall be applicable to service on said line: For all customers not contracting for continuous service twelve months in the year, $2.50 per month. For all customers contracting for continuous service twelve months in the year, $2 per month, and that with such exceptions the applicable tariff rates of the Mountain States Power Company in the localities shall apply for all energy used for light or power.

P.U.R.1928A.

It is *further ordered,* that the secretary shall serve a copy of this report and order upon each of the parties hereto and that the same shall be in full force and effect forthwith.

PENNSYLVANIA PUBLIC SERVICE COMMISSION.

LEHIGH TRACTION COMPANY
v.
MOTOR TRANSPORTATION COMPANY, INCORPORATED.

[Complaint Docket No. 7158.]

MOTOR TRANSPORTATION COMPANY, INCORPORATED.
v.
HAZLETON AUTO BUS COMPANY.

[Complaint Docket No. 7250.]

Certificates of convenience and necessity — When required — Effect of approval of incorporation.

Commission approval of the incorporation of a motor transportation company in a stated area does not of itself confer the right to begin to operate, but a certificate of public convenience and necessity must be obtained covering each route.

[July 26, 1927.]

COMPLAINTS against alleged illegal operation of motor vehicles as common carriers; complaints sustained and discontinuance of service ordered unless approval of operation should be secured.

By the **Commission:** These two complaints relate to motor bus transportation between the city of Hazleton and the borough of McAdoo. The complainant in the first case is owner of the stock of the respondent in the other. The two cases will be considered together and disposed of in this report.

In 1914, a certificate of public convenience was issued by the Commission evidencing its approval of the incorporation of the Motor Transportation Company for the purpose of trans-

porting personal property and passengers between certain cities and towns in the counties of Luzerne, Schuylkill, and Carbon, including the city of Hazleton and the Borough of Tamaqua and intermediate points. No application was made for the right to begin to render service and no other certificate of public convenience was issued. The company immediately established a passenger bus route from Hazleton to Tamaqua. No other service is rendered by it.

In its application for approval of incorporation, the Motor Transportation Company stated that it would not compete with any existing public service company excepting the Lehigh Valley Railroad Company and the Philadelphia & Reading Railway Company. The town of McAdoo is located on its route between Hazleton and Tamaqua. A line of the Lehigh Traction Company, a street railway company, is operated between Hazleton and McAdoo. From McAdoo to Hazleton the Motor Transportation Company operates in direct competition with the traction company. The Lehigh Traction Company claims that the Transportation Company has no legal right to operate at all because it has not received approval of the Commission to anything except its incorporation, and that if the certificate already granted gave to it a right to operate, there was an implied condition that the company would not carry passengers locally between Hazleton and McAdoo in competition with the railway company.

In 1926, the Commission issued a certificate of public convenience approving the operation of motor busses by the Hazleton Auto Bus Company, a subsidiary of the Lehigh Traction Company, over certain routes. One of these routes (Route No. 10) provided for regularly scheduled service from the end of the railway line in McAdoo around a 2-mile circuit to point of beginning. Two other routes provided for service between Hazleton and McAdoo, which was stated to be supplemental to the service then being furnished by the railway companies,—"that is, an emergency service at times when there is an interruption of the service on the line of said railway corporations, and when at peak periods the facilities of the said railway corporations are not sufficient to adequately accommodate the pub-

lic." The certificate contained a condition that a monthly statement of service furnished on the route between Hazleton and McAdoo be filed with the Commission, containing certain information including the reason or occasion for supplementing the railway service and the duration of the motor vehicle service.

Beginning on March 7, 1927, the Hazleton Auto Bus Company began operation of a regular service over Route No. 10, in the morning and evening. Instead of terminating the route at the end of the railway line in McAdoo it carried its passengers directly to Hazleton or other intermediate points. The operation of motor busses directly from McAdoo to Hazleton permitted the discontinuance of operation of one trolley car between those points. The Motor Transportation Company complains that such operation is not in accordance with the approval granted by the Commission.

Although the records in the two complaints seem to establish the necessity for motor vehicle transportation of passengers between McAdoo and Hazleton, they also show that both the Motor Transportation Company and the Hazleton Auto Bus Company are engaged in such service without authority. The Motor Transportation Company has been engaged in transporting passengers for more than ten years, but such operation does not confer upon it the right to engage in the service without having first received the approval of this Commission, as evidenced by its certificate of public convenience. The Commission has already held (Fagan v. Pittsburgh Transp. Co. 8 P. C. R. 44, 218; 4 Pa. P. S. C. Decisions 65, 206) (See P.U.R.1919E, 990) that approval of incorporation does not of itself confer the right to begin to operate. If the claim of the Motor Transportation Company that it has the right to operate between McAdoo and Hazleton because of the approval of its incorporation in 1914 were sustained, that company would have an equal right to begin to transport not only passengers but also freight between the city of Hazleton, Luzerne county, and Tamaqua, Oneida, and Sheppton, Schuylkill county, and Beaver Meadow, Carbon county, and Harwood and Humboldt, Luzerne county, and between Freeland and White Haven, Luzerne county, and intermediate points, over none of which routes does it

operate at present with the exception of the route between Hazleton and Tamaqua. The Commission in 1924 authorized operation by the Motor Transportation Company over a detour between McAdoo and Tamaqua while the state highway was being repaired, but that certificate did not confer any further rights than were granted by that certificate. The fact that the company had never previously received approval of its operation was not called to the attention of the Commission at that time.

The certificate granted to the Hazleton Auto Bus Company for service between Hazleton and McAdoo authorized only an emergency service. It did not authorize a regular daily scheduled service between those towns, to be operated in connection with service over Route No. 10. The end of the railway line in McAdoo was made the termini of Route No. 10 for the purpose of permitting transportation of persons to and from the railway cars and was not intended as a way station on a route to Hazleton.

The Commission finds and determines that the Motor Transportation Company is engaged in transporting passengers for hire as a common carrier, without first having received approval of this Commission to such transportation, and that the Hazleton Auto Bus Company is engaged in transporting passengers on a scheduled route between McAdoo and Hazleton without first having received the approval of this Commission. The service being rendered appears to be desirable and has apparently been rendered under a misunderstanding of the rights conferred by the certificates of public convenience already issued by the Commission. The Commission will, therefore, direct that the Hazleton Auto Bus Company and the Motor Transportation Company cease and desist from such operation unless they shall within ninety days from the date of service of this report file with this Commission applications for approval of such service as they desire to render. Upon such applications, the Commission will authorize such service as public necessity and convenience may require. Orders will issue in accordance with this report.

P.U.R.1928A.

PENNSYLVANIA PUBLIC SERVICE COMMISSION.

J. A. W. BRUBAKER & BROTHERS

v.

MILLERSBURG HOME WATER COMPANY.

[Complaint Docket No. 7299.]

Rates — Meters — Minimum charge — Necessity for plumbing connection — Water.

1. A water consumer charged with a minimum amount for water service to a number of his tenants cannot complain that the utility has not provided each tenant with a service pipe and separate meter where he has previously refused to make the necessary plumbing rearrangements so that the utility could install individual meters, p. 810.

Rates — Single meter — Minimum charge — Water utility.

2. A water utility may properly charge the owner of a house, having sixteen tenant consumers being supplied through a single meter, an amount of sixteen minimum charges and thereafter at the rate per thousand gallons making due allowances for vacancies, where a rule of the utility provides: "The service line to which the company will attach a meter must be a separately controlled service line supplying a single consumer," p. 811.

Rates — Size of meter — Minimum charge per customer — Water.

3. The Commission can be guided in determining the proper minimum charge per customer only by the size of the meter that would normally be required to supply an individual consumer in any case where each consumer is receiving service through an individual meter, p. 811.

[November 15, 1927.]

COMPLAINT of excessive water bill; complaint dismissed.

By the **Commission:** Complainants, owners and operators of a business block situated at Market and Center streets, Millersburg, rent to various tenants, store rooms, offices, and apartments in the same building, which it is claimed has one common hall and one or more means of entrance. By complaint filed June 11, 1927, it is alleged that complainant was overcharged for water service furnished by respondent, for the three months' period ended April 1, 1927, by assessing seventeen minimum charges of $3 each, instead of applying the published meter rates for the registered consumption of 92,000 gallons.

The question for determination before the Commission is whether the respondent can assess a minimum rate for every

room or apartment in the building, or whether the charges should be assessed under the meter rate.

The building heretofore referred to has a frontage on Market street of 56 feet, is 165 feet in depth and is three stories high. On the ground floor there are six store rooms. Eight apartments and a law office, consisting of two rooms, are located on the second floor. Two lodge rooms are located on the third floor. In each of the six store rooms, there is a toilet and lavatory with hot and cold water and the eight apartments have the usual kitchen and bath room installations. The only fixtures in the law office are a wash stand with two spigots. The one lodge room has two toilets and hot and cold water in a kitchen, while the other lodge room has a toilet and a lavatory.

Respondent's tariff page 9 provides:

"All consumers who are metered will pay a minimum charge which will be governed by the size of the meter," and on page 15:

Rule 53 "Consumer, as used herein, shall be the party contracting for a supply of water to a property as herein classified:

(e) "A building of more than one apartment and using in common one hall and one entrance.

(f) "A building having a number of apartments and/or offices, and/or business and using in common one hall and one or more means of entrance."

Rule 60 "Each consumer will be supplied through a separate meter, except however, in case (d), (e), and (f), as above defined, should the landlord or owner desire that the company deal with the tenant, he must first provide means of supplying, controlling the supply, and housing the metering device for each tenant, the controlling device to be outside of the building and the measuring device or meter to be properly or conveniently housed either outside or within the building."

Service is furnished this entire building through one service line and one meter. Prior to January 1, 1927, service was furnished at a "flat rate" and complainant was billed for 18 consumers, $87. per quarter. Respondent's tariff provides that apartments and flats shall be charged at "dwelling house rates for each family." The meter was installed on the respondent's

initiative in accord with the program for metering all services as rapidly as practicable. The complainant was asked to arrange the plumbing in the building so that each tenant could be furnished service through a separate service line and meter. As the complainant did not make the changes suggested, one meter was installed on the single service line.

Respondent testified that its practice is to assess a minimum charge for each consumer connected. At the time of the hearing 34 other meter installations had been made for which 76 minimum charges are exacted.

[1] Complainant relies to some extent upon the fact that each tenant is not provided with a service pipe and a separate meter. As hereinbefore stated, the complainant refused to make the necessary rearrangements so that the respondent could install individual meters as provided in Rule 60. In disposing of Complaint Docket No. 5656, South Fork v. South Fork Water Co. 12 P. C. R. 269, P.U.R.1923E, 814, 815, under a somewhat similar state of facts, the Commission stated:

"It appears from the uncontroverted evidence that respondent makes a minimum meter charge for each separate consumer where two or more families or users of water are on the same service line. If two families are being served through one metered service line, one family having only one outlet and the other two outlets, the company makes a minimum charge of $3 for the one family and $4 for the other; all water used through such service line after the combined minimum rates have been reached is charged for at the rates per thousand gallons designated in the tariff. The complainant's contention is that only one minimum rate should be charged regardless of the different consumers making use of the same service line, and when this rate has been exhausted the water used should be charged for at the thousand gallon rate. This reasoning is more plausible than sound, and if made the basis of the Commission's decision, would operate to discriminate in the distribution of the rate burden equitably among all consumers. This minimum rate is not a charge against the meter, but against the consumer and it, therefore, follows that each consumer should be charged the minimum rate although he may be receiving the water through

only one metered service line. The respondent might require an individual service line for each consumer, or the consumer himself may elect to put in a separate service line, but so long as different consumers make use of the same service line the Commission is not convinced that respondent is violating its filed tariff by charging the minimum rate for each consumer on the line, and after the combined minimum rates have been exhausted charging for the water thereafter used at the thousand gallon rate."

[2] Upon all the facts of record we conclude and find that the respondent is properly charging 16 minimum charges for the premises in question, two of the ground floor store rooms being occupied as one. Due allowance should be made for vacancies.

Rule 18 of the respondent's tariff provides:

"The service line to which the company will attach a meter must be a separately controlled service line supplying a single consumer."

[3] In view of the fact that each consumer, in question, is not receiving service through an individual meter, the Commission can be guided only, in determining the proper minimum charge per consumer, by the size of the meter that would normally be required to supply the individual consumers as herein determined. It would appear from the record that a $\frac{5}{8}$ inch or $\frac{3}{4}$ inch meter would meet the needs of all individual consumers, and the minimum charge of $3 per quarter prescribed by respondent's tariff for those sizes is the correct charge to apply.

CALIFORNIA SUPREME COURT.

SUTTER BUTTE CANAL COMPANY

v.

RAILROAD COMMISSION OF CALIFORNIA.

[S. F. 12070.]

(— Cal. —, 259 Pac. 937.)

Constitutional law — Police power — Exercise of power over utilities by Commission.

1. The police power is one of the attributes of state sovereignty

P.U.R.1928A.

that cannot be limited by contract, and to the Commission has been committed the execution of this power over public utilities. (California Constitution, § 23, Art. 12; General Laws 1923, p. 2702), p. 815.

Discrimination — Power of Commission — Consumer contract for irrigation.

2. The Commission has power to remove discrimination in irrigation rates by releasing old consumers who have defrayed pioneer expenses from the burden of lien-bearing contracts and allowing them the same advantages as new consumers without contract, p. 817.

Rates — Contracts — Abandonment of status — Reinstatement.

3. A former contract consumer once electing to avail himself of the status of a noncontract consumer, may not thereafter reinstate himself under the contract over the objection of the utility, p. 822.

Service — Duty to serve — Effect of service contract — Irrigation.

4. The duty to serve is neither greater nor less by reason of a contract for service where a dedication of water service has been made for lands by a canal company, p. 822.

Valuation — Property paid for by consumers — Assessment donation — Pumping station.

5. A sum donated by assessed consumers to contribute to the construction at peak prices of an emergency pumping station, was properly excluded by the Commission from the rate base of a canal company, which was allowed only the sum actually expended by itself, p. 822.

Valuation — Ascertainment for rate making — Reproduction cost — Uninformed witness.

6. A contention that the Commission refused to consider reproduction cost is unfounded where the only evidence produced by the utility upon the subject was a witness who admitted using uncertain assumptions rendering his estimate inaccurate, p. 823.

Return — Confiscation — Percentage allowed — Value of service — Irrigation.

7. The rate of 5.28 per cent return of valuation of a canal company was not considered, as a matter of law, so low as to be confiscatory in view of many complications in operating the system and evidence tending to show rates in excess of value of service, p. 824.

[September 26, 1927.]

APPLICATION to review order of Railroad Commission fixing rates of canal company; order affirmed.

Appearances: Isaac Frohman and Devlin & Brookman, all of San Francisco, W. H. Carlin, of Marysville, and Henry Ingram, of Gridley, for petitioner; Carl I. Wheat and Reginald L. Vaughan, both of San Francisco, Arthur T. George, of Los Angeles, and Elmer W. Armfield and Arthur B. Eddy, both of Woodland, for Sutter Butte Water Users Association.

Preston, J.: By this proceeding petitioner seeks to have reviewed and annulled a decision and order of the Railroad Commission, designated Decision No. 16289, made on March 20, 1926, relating to its water rates, complaint being made of the valuation of its property for rate-fixing purposes, the rate of return thereon, and the modification and practical abrogation of certain continuous contracts for the furnishing of water held by it with a certain class of consumers.

In previous decisions this court has had occasion to outline the history of petitioner as a public utility engaged in the business of appropriating water from the Feather river and selling and distributing the same for irrigation purposes in Butte and Sutter counties, in this state, and reference is made to the statements of fact set forth therein. Butte County Water Users' Asso. v. Railroad Commission, 185 Cal. 218, 196 Pac. 265; King v. Railroad Commission, 190 Cal. 321, 212 Pac. 200; and Live Oak Water Users' Asso v. Railroad Commission, 192 Cal. 132, P.U.R.1924B, 790, 219 Pac. 65.

Petitioner, a public utility, admittedly subject to the power of the Railroad Commission, is in possession of a water right dedicated to the public use. Its consumers are divided into two classes—contract consumers and noncontract consumers. Water was originally furnished to the contract consumers under so-called "water right contracts," or continuous supply contracts, whereby the consumer paid an initial amount, usually $10 per acre, for the privilege of obtaining the contract, and agreed to pay a stipulated rate for irrigation water service each year thereafter upon the total acreage covered by the contract, and the company on its part agreed to furnish water as required for all of the acres covered thereby. Noncontract consumers or applicants, pursuant to order of the Commission made in March, 1918, were served upon the basis only of applications for water made from year to year. This dual situation has existed since 1918, and the Railroad Commission has attempted to solve the problem presented by these two classes of consumers by various orders and decisions, the last two of which, the one here involved and the one prior thereto, may be briefly described as follows:

Decision No. 14422, rendered on December 31, 1924, P.U.R. 1925D, 677, after application by petitioner for a further increase in the water rates, increased the 1922 rates and abolished the differential in rates between contract and noncontract holders. It established a standby or service charge of $1.25 per acre, payable by both classes, effective as to noncontract holders for all of their lands covered by their applications during such time as they should continue on thereunder, and in any event for not less than three years, and to be continuously effective as to contract holders for all of the lands covered by their contracts, provided, however, by Rule 3, that if such contract holder does not desire to use in any year the whole or any of said water which he is so entitled to receive, and "files with the company on or before February 1st of that year notice in writing of what he does desire in respect to the nonservice of water, he shall then be obligated to pay in that year, and in each year thereafter in which said notice remains in effect, on or before February 1st thereof, the service charge of $1.25 per acre of the land for which no water is desired as specified in said notice, and, as to the remainder of his land, such rates or charges based upon the extent and character of use of the water which he desires to use, as are in effect."

Thereafter, and in 1925, the proceeding which resulted in Decision No. 16289, the validity of which is here involved, was "instituted on the Commission's own motion for the purpose of making a complete and new investigation of the rates, charges, classifications, contracts, rules, regulations, and service of the Sutter Butte Canal Company, in view of the development of considerable protest and dissatisfaction following the fixing of rates on the Sutter Butte Canal Company system by this Commission in Decision No. 14422, dated December 31, 1924 [P.U.R.1925D, 677]."

Said decision modified the previous rule so as to give to each continuous contract holder the right, at his option, either (1) to obtain water under applications for so much of his land as he desired to irrigate, similarly with applicants generally who were not holders of continuous contract; or (2) to obtain water under his continuous contract, provided that if he so elects, he may still,

by notifying petitioner that he does not desire "to use in any year the whole or any of the water which he is so entitled to receive, and files with the company on or before February 1st of that year notice in writing of what he does desire in respect to the nonservice of water, he shall then be obligated in that year, and in the next succeeding year thereafter, but for no further period in which said notice remains in effect, to pay, on or before February 1st thereof, the service charge of $1.25 per acre of the land for which no water is desired, as specified in said notice; . . ." or (3) to release himself from any obligation to pay any charge to petitioner under his continuous contract by giving notice that he does not desire any water for his land in any year, or to neither give notice nor use the water.

The substance of the order here under consideration is to pave the way for the release of all contract consumers. It is true that the contracts may be retained at the election of the consumer, but the whole plan is in reality, when stripped of its complications, an effort by the Railroad Commission to abolish all distinction between the two classes of consumers and to put them upon a parity in order that there may be removed from the controversy this source of friction and trouble.

The Commission in this behalf, among other things, said:

"Rates fixed herein will therefore be on the basis that all service be charged for under a uniform schedule of rates and under application forms which will exclude any consideration of the continuous contract and preclude the making of charges for unirrigated lands under said contracts, as such."

[1] The controlling question in the proceeding is, therefore, the extent of the power that may be exerted by the Railroad Commission upon the contracts between petitioner and the contract consumers. The police power is one of the attributes of state sovereignty and cannot be limited by contract. It operates upon property and property rights, including contracts, to the extent necessary for the protection of the public health, safety, morals, and welfare. To the Railroad Commission has been committed the execution of this power over public utilities in California. The scope of this power is defined in the state Constitution as follows:

Section 23, art. 12: "Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any . . . canal, pipe line, plant, or equipment, or any part of such . . . canal, pipe line, plant, or equipment within this state, . . . for the production, generation, transmission, delivery or furnishing of heat, light, water or power . . . either directly or indirectly, to or for the public . . . is hereby declared to be a public utility subject to such control and regulation by the Railroad Commission as may be provided by the legislature, and every class of private corporations, individuals, or associations of individuals hereafter declared by the legislature to be public utilities shall likewise be subject to such control and regulation. The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the state of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the legislature, and the right of the legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution. . . ."

The powers conferred are more specifically set forth in §§ 31 and 32 of the Public Utilities Act (Deering's Gen. Laws of 1923, p. 2702).

The exercise of the power thus conferred upon the Railroad Commission may be reviewed only in the manner specified by the statute, which is in brief as follows:

". . . The review shall not be extended further than to determine whether the Commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the state of California. The findings and conclusions of the Commission on questions of fact shall be final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the Commission on reasonableness and discrimination. The Commission and each party to the action or proceeding before the Commission shall have the right to appear in the

review proceeding. Upon the hearing the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the Commission. . . ." Public Utilities Act, *supra*, § 67.

[2] The covenants of the contract here to be tested for the operation of the police power are as follows: That the canal company furnish water at the rate of one cubic foot per second for each 160 acres of land described in each contract for the purpose of irrigating the land. In cases where water is desired by the landowner, at his option, to be furnished by the canal company for producing rice, the contracts provide for the furnishing of water at the rate of 3 cubic feet per second for each 160 acres of land, and at a higher charge per acre than is provided for water furnished for the production of crops other than rice.

That the water covered by the contract shall be and become appurtenant to the land therein described, and can only be conveyed by and with a conveyance of the land; that all the covenants and conditions of the contract shall run with the land; that the use of the water must be confined to said land. That the landowner shall construct and maintain a ditch from the company's ditch to his land, which at the option of the canal company may be taken over and operated by it; that the landowner grants to the canal company a right of way through his land; that the landowner shall pay to the canal company the specified rate for each acre annually on September 1 of each and every year; that all sums due or to become due to the canal company under the contract shall be and become a lien on the lands described therein and may be foreclosed as any other lien; that the heirs, successors and assigns of the respective parties are forever bound by the contract; that in case of water shortage each landowner is to be entitled only to a proportional share of the water available; that it is understood that the canal company will contract for the delivery of 1,000 cubic feet of water per second. Where a lump sum was provided to be paid annually by the landowner, such sum was computed by multiplying the rate per acre by the number of acres described in the contract.

The power to increase the charges for service has been twice exercised by the Railroad Commission at the behest of peti-

tioner, as hereinabove pointed out. The times and terms of payment under said contracts have been changed by the same power. As far as the petitioner is concerned, its privileges and emoluments under the contracts have been greatly increased. So far as the consumer is concerned, however, the contract has slight, if any, benefit to him left in it. The only privilege he has apparently is to sit by and see the eleventh hour consumer, who has no contract, served with water upon less onerous terms than he who has borne the burden during the trying periods of earlier days. For the contract consumer must pay a service charge on the whole acreage under contract for all lands described therein upon which water is not used in a given season, while the new consumer only has to apply for water for lands which he intends to irrigate and only has to pay the service charge thereon for the acreage which he does not actually irrigate. And he may satisfy all demands against him in three years, if not sooner, and be completely released.

In other words, the new consumer has a chance for the exercise of his judgment and discretion upon the situation as it arises, whereas without the order in question the contract holder is firmly bound, not for a space of time but perpetually, without a single opportunity to exercise judgment or discretion in his efforts to better his condition. He is condemned to pay, and that forever, the charge annually accruing, which is a lien upon his inheritance. If the Commission may not relieve this discrimination, then it must follow that since 1918 every new consumer has been illegally admitted to water service as such consumer was not required to sign a contract for perpetual service. For if the Commission may allow a dedication of service to a new consumer without demanding of him a perpetual obligation, then it must follow that it has the power to remove discrimination thus created between the two classes of consumers. The legality of this dual classification has already been sustained by this court. King v. Railroad Commission, 190 Cal. 321, 212 Pac. 200; Live Oak Water Users' Asso. v. Railroad Commission, 192 Cal. 132, P.U.R.1924B, 790, 219 Pac. 65. In these causes petitioner appeared and espoused the orders of the Railroad Commission. In fact, by a process originating in keen paternal in-

terest, the Commission has heretofore devised many plans to aid petitioner, all of which have been executed at the expense of the contract consumer. The order here in question is the only one to which petitioner has or could have objected.

The power of the Railroad Commission is little indeed, if it may not intervene to remove such palpable discrimination. The Commission has found that the time has arrived for this action. Practically the only provision of the contracts not modified already by this court is the one changing the duration of the contract. But it must follow that if, in fixing rates, or in removing discrimination, the duration of the contract relationship is encountered, it must yield to the regulatory power lodged by the Constitution in the Commission even to the extent of out and out termination or release of such contract.

Moreover, petitioner is in no position to urge that this conclusion is not correct, for it has on previous occasions successfully urged the Commission to fix constructive periods of time for which noncontract consumers must obligate themselves to pay in order to get water service. Three years is the period mentioned as to them in the order here under review. If it is within the power of the Commission to require a consumer to sign an agreement to pay for three years' service in order to get water for his present year's needs, it must surely be true that the power to add a constructive period to the obligation implies the power to curtail an indefinite period and thus place the two classes of consumers of the same utility on an equal basis. In other words, it is clear that it is well within the regulatory power of the Commission to disregard altogether the contracts in so far as they provide for periods of future service and fix a present rate for water actually consumed, and disregard all paternalistic provisions in favor of petitioner at the expense of either class of consumers. It follows logically then that the order under review is not open to the criticism that it violates any of petitioner's constitutional rights under the contracts. Any language found in the case of Live Oak Water Users' Asso. v. Railroad Commission, *supra,* which may seem to be at variance with these views, must be read in connection with the issue there involved, which was the validity of this dual classification among consum-

ers of this utility and the right to charge against contract holders the service fee on the lands not irrigated. The power of the Commission to disregard the duration period of said contracts was not there involved.

The holding we here make as to the power to modify or abrogate said contracts in the manner done by the order under consideration has been clearly foreshadowed in the following cases: Southern P. Co. v. Spring Valley Water Co. 173 Cal. 291, 298, 159 Pac. 865, L.R.A.1917E, 680; Limoneira Co. v. Railroad Commission, 174 Cal. 232, 237, 238, P.U.R.1917D, 183, 162 Pac. 1033; Live Oak Water Users' Asso. v. Railroad Commission, *supra;* Leavitt v. Lassen Irrig. Co. 157 Cal. 82, 93, 106 Pac. 404, 29 L.R.A.(N.S.) 213; Traber v. Railroad Commission, 183 Cal. 304, 312, P.U.R.1921A, 67, 191 Pac. 366; Law v. Railroad Commission, 184 Cal. 737, 740, P.U.R.1921C, 156, 195 Pac. 423, 14 A.L.R. 249. Indeed, this identical question was before the supreme court of the state of Washington in the case of Raymond Lumber Co. v. Raymond Light & Water Co. 92 Wash. 330, P.U.R.1916F, 437, 159 Pac. 133, 135–137, L.R.A.1917C, 574, and the power of the Commission so to abrogate said contracts between the utility and its consumers was upheld.

In Law v. Railroad Commission, *supra,* at page 740 (195 Pac. 424), it is said:

"If the service contracted for was devoted to public use (Allen v. Railroad Commission, 179 Cal. 68, P.U.R.1919A, 398, 175 Pac. 466, 8 A.L.R. 249), the contract for the service was subject to the exercise of the police power and the state having elected to confer upon the Commission the power to prescribe uniform rates for the service, petitioner cannot complain if the exercise of this power results in the practical annulment of his private contract fixing compensation for a public service (Producers' Transp. Co. v. Railroad Commission, 251 U. S. 228, 64 L. ed. 239, P.U.R.1920C, 574, 40 Sup. Ct. Rep. 131)."

In Manigault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. Rep. 127, this principle is stated as follows:

"It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent

the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power which in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals."

In Market Street R. Co. v. Pacific Gas & E. Co. (D. C.) 6 F.(2d) 633, 635, P.U.R.1926A, 509, 515, it is said:

"On the question of the power of the state to regulate the contracts of its public utilities with their consumers the law is now well settled. 'The courts hold that all contracts relating to public service, entered into between the corporation operating a public utility and the private consumer, contained from the very nature of their subject-matter an implied reservation of the right of the state to lawfully exercise its police power for the general welfare, and that there is no impairment of the obligations of contract within the guaranties of the state or Federal Constitution, even though said contract is thereby rendered partially or wholly invalid.' In Re Guilford Water Company's Service Rates, 118 Me. 367, P.U.R.1920C, 363, 108 Atl. 446, 450; Union Dry Goods Co. v. Georgia Pub. Service Corp. 248 U. S. 372, 376, 63 L. ed. 309, P.U.R.1919C, 60, 39 Sup. Ct. Rep. 117, 9 A.L.R. 1420; Producers' Transp. Co. v. Railroad Commission, 251 U. S. 228, 232, 64 L. ed. 239, P.U.R.1920C, 574, 40 Sup. Ct. Rep. 131; Arkansas Nat. Gas Co. v. Arkansas R. Commission, 261 U. S. 379, 382, 67 L. ed. 705, P.U.R.1923C, 714, 43 Sup. Ct. Rep. 387; Ogden Portland Cement Co. v. Public Utilities Commission, 258 U. S. 609, 66 L. ed. 788, 42 Sup. Ct. Rep. 381."

In Union Dry Goods Co. v. Georgia Pub. Service Corp. 248 U. S. 372, 63 L. ed. 309, P.U.R.1919C, 60, 64, 39 Sup. Ct. Rep. 117, 9 A.L.R. 1420, Mr. Justice Clarke, speaking for the court, concluded his examination of this subject with this observation:

"These decisions, a few from many to like effect, should suffice to satisfy the most skeptical or belated investigator that the

right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the state. . . ."

[3, 4] It is no answer to this contention to say that the contracts still bind the petitioner, and it must as to these contract holders stand ready to serve the whole acreage therein mentioned and may not safely take on additional consumers for that reason. It is not for this court to say how much strength, if any, remains in these pacts, but one thing we may say, and that is that any contract consumer who elects to avail himself of the status of a noncontract consumer may not, if petitioner properly protests, return to his former status under the contract. Law v. Railroad Commission, *supra,* at p. 741 (195 Pac. 424). But a still more satisfactory answer to this contention of petitioner is the fact that, contract or no contract, dedication of water service has been made for these lands and the corresponding duty to serve is neither greater nor less by reason of the contracts. Leavitt v. Lassen Irrig. Co. *supra,* at p. 89 (106 Pac. 407); Byington v. Sacramento Valley West Side Canal Co. 170 Cal. 124, 133, 148 Pac. 791.

[5] Petitioner also complains that the Railroad Commission excluded from the rate base an item of $309,000 donated by landowners towards the cost of what is known as the Sutter County Extension. Where there is sufficient legal evidence found in the record to sustain the Commission's order, it is not within the power of the court to interfere. Williamson v. Railroad Commission, 193 Cal. 22, 35, 222 Pac. 803. This situation is best described in the language of the Commission:

"The effect of the construction of the Sutter county extension by the company on the rates of the Sutter Butte Canal Company has been the subject of much controversy. It has been the belief of many of the landowners in Butte county that this extension was entirely unjustified, and that it has resulted in an extra and unreasonable burden on the water users in that county. Much testimony was introduced relative to this matter. It appears that in 1918 certain landowners of Sutter county negotiated with this company for a supply of water. In 1919, an agreement was entered into for the service of 14,400 acres by the construc-

tion of distribution laterals and the utilization of the Live Oak slough for the conveying of water to this general territory. The cost of the construction was to be paid in full by the landowners, and later to be refunded on the basis of one-seventh of the annual revenue received. In 1920, it was found necessary to extend the main canal to this district and discontinue the use of the Live Oak slough. A new contract was entered into whereby the landowners were required to advance $20 per acre, while the company agreed to complete the construction and install a pumping plant on Feather river. The total cost of the project was approximately $835,000, and the company's investment slightly over $526,000. This work was done at the peak of prices and, in addition, was rushed so that without question the cost exceeded a reasonable cost under present conditions and some additional cost over normal construction occurred at the time of the development. In past decisions, the amount of the rate base for this extension has been the amount invested by the company."

The Commission for the reasons indicated above excluded the item and allowed only the investment by the company. There is no contention that the evidence does not warrant the observations above quoted. We see no ground upon which this court may intervene in such a situation. The fact that the item has been consistently excluded in previous orders to which the petitioner made no protest convinces us that it has placed its chief reliance upon the questions above discussed and not upon this action of the Commission.

[6] As to the further contention that the Commission arbitrarily refused to consider reproduction cost in its rate-fixing order, an examination of the record discloses that the Commission only had before it on that subject the testimony of the witness Ryan, who had admittedly used a number of uncertain assumptions which would render his estimate inaccurate, and the Commission was well within its authority in determining that it could base no conclusion upon this testimony. Of it the Commission said:

"An estimate of reproduction cost new totaling $2,676,118 was presented through Mr. Ryan. This was based on the appraisal

by Mr. Ware, applying price ratios with a view to determining the probable reproduction cost new under 1924 price conditions. This appraisal was of a very general nature and the evidence indicates a failure on the part of Mr. Ryan to take into consideration changes in the art of construction and the use by him of other general assumptions which would tend to give a figure in excess of reasonable." 27 Cal. R. C. R. 765, 773.

The witness concerning his own testimony said:

"This is not an attempt to make a reproduction valuation of the property, or show the cost of reproducing it, but only to convert the investment actually made into terms of dollars of 1925 levels."

It is not a fair characterization to say the Commission arbitrarily refused to consider this factor. On the contrary, the Commission did consider the item of evidence and found it insufficient upon which to predicate action. The legality of the system of valuation employed is, therefore, not raised on this record.

[7] Complaint is also made that the estimated rate of return on the valuation fixed is only 5.28 per cent. We are pointed to no figures which show this estimate to be above question as to its accuracy. Moreover, no consideration of the value of the service to the consumers is taken into account. Much proof was introduced to show that existing rates were in excess of the value of such service. In view of the many complications inhering in the system of operation of this utility, we are unable to say, as a matter of law, that the rate of return is so low as to be confiscatory.

It would seem that the Commission has been jealous of the rights of the petitioner, and that the order in question may go far toward forming a better basis for solving the problems of all concerned, and if discrimination results at any point from it, rectification by the Commission will, no doubt, ensue.

The order is affirmed.

We concur: Waste, C. J.; Richards, J.; Curtis, J.; Langdon, J.; Shenk, J.; Seawell, J.

P.U.R.1928A.

OKLAHOMA SUPREME COURT.

KANSAS, OKLAHOMA & GULF RAILWAY COMPANY et al.

v.

STATE et al.

[No. 16775.]

(— Okla. —, 260 Pac. 468.)

Appeal and review — Conclusiveness of Commission findings — Supporting evidence.

1. If there is any evidence to support the order of the Corporation Commission fixing a rate, the prima facie presumption of fairness and reasonableness will obtain, pursuant to Const. art. 9, § 22, p. 826.

Constitutional law — Provision for presumption in favor of Commission findings.

2. Under § 22, art. 9 of the Constitution, all orders made by the Corporation Commission are presumed to be reasonable until the contrary is made to appear. This presumption, in favor of the reasonableness of orders made by the Corporation Commission was created by the Constitution of the state for a definite purpose and cannot be disregarded by this court, unless the contrary is made to appear, p. 827.

Discrimination — Powers of Commission to determine other than reasonableness of rates.

3. In fixing a rate to be charged by a railway company, the Corporation Commission is not confined to the sole question of the reasonableness of the rate. It may be reasonable, yet, if it discriminates in favor of one locality as against another, it should be corrected, p. 829.

[October 25, 1927.]

Headnotes by the COURT.

APPEAL from order of Corporation Commission fixing rates on transportation of coal and coke; affirmed.

Appearances: W. R. Bleakmore, John Barry, and A. T. Boys, all of Oklahoma City, for plaintiff in error Kansas, Oklahoma & Gulf Railway Company; Raymond W. Moore, of Kansas City, and George A. Henshaw and A. Carey Hough, both of Oklahoma City, for plaintiff in error Dewey Portland Cement Co.; George M. Porter, of McAlester, for plaintiffs in error Carbon Coal Company and others; Reed & Glover, of Kansas City, Mo., for plaintiffs in error Cherokee Fuel Company and others; Edwin

Dabney, Attorney General, William L. Murphy, Assistant Attorney General, and Paul A. Walker, Special Counsel, of Oklahoma City, for defendants in error.

Phelps, J.: The Corporation Commission of the state of Oklahoma, after due notice and hearing, entered its Order No. 3092, fixing the rates to be charged by the railroads of the state on coke and coal shipped from various points to other points within the state, and from the findings of fact, judgment, and order thus entered, plaintiffs in error prosecute their appeal to this court, assigning and arguing together two errors, the first of which is that the order so promulgated is unreasonable, unjust, and not founded upon any evidence, and, second, that the findings of fact were not supported by any evidence and were made arbitrarily by the Corporation Commission.

[1] Section 22 of article 9 of the Constitution of Oklahoma provides:

"That the action of the Commission appealed from shall be regarded as prima facie just, reasonable, and correct."

In support of this provision of the Constitution, in their briefs, counsel cite numerous authorities from this and other jurisdictions. However, this question has been before this court so often and has been so thoroughly emphasized and clarified that no good purpose could be here served by extended comment and we will content ourselves by merely referring to Muskogee Gas & E. Co. v. State, 81 Okla. 176, P.U.R.1920C, 806, 814, 186 Pac. 730, in which this court said:

"Findings of fact made by the Corporation Commission are by § 22, art. 9, Constitution, *prima facie* just, reasonable, and correct. Atchison, T. & S. F. R. Co. v. State, 23 Okla. 210, 100 Pac. 11, 21 L.R.A.(N.S.) 908; Atchison, T. & S. F. R. Co. v. State, 23 Okla. 510, 101 Pac. 252; Chicago, R. I. & P. R. Co. v. State, 24 Okla. 370, 103 Pac. 617, 24 L.R.A.(N.S.) 393; Ft. Smith & W. R. Co. v. State, 25 Okla. 866, 108 Pac. 407; Missouri, K. & T. R. Co. v. Witcher, 25 Okla. 586, 106 Pac. 852; Atchison, T. & S. F. R. Co. v. State, 28 Okla. 476, 114 Pac. 721; St. Louis, I. M. & S. R. Co. v. State, 28 Okla. 372, 111 Pac. 396; 114 Pac. 1096; U. S. Express Co. v. State, 47

Okla. 656, 150 Pac. 179; St. Louis & S. F. R. Co. v. Travelers' Corp. 47 Okla. 374, 148 Pac. 166. . . ."

[2] Following the rule enunciated in the authorities cited in the opinion from which the above quotation is taken, in Oklahoma Gas & E. Co. v. State, 102 Okla. 3, P.U.R.1924E, 652, 225 Pac. 710, in the second paragraph of the syllabus this court said:

"Under § 22, art. 9, of the Constitution, all orders made by the Corporation Commission are presumed to be reasonable until the contrary is made to appear. This presumption, in favor of the reasonableness of orders made by the Corporation Commission was created by the Constitution of the state for a definite purpose and cannot be disregarded by this court, unless the contrary is made to appear."

And in Western Oklahoma Gas & Fuel Co. v. State, 113 Okla. 126, P.U.R.1926B, 505, 239 Pac. 588, paragraph 8 of the syllabus reads as follows:

"It is presumed that the Corporation Commission acted fairly in fixing a rate, and the burden of proof is on the company to show a deprivation, by rate fixed, of fair return on its property."

It will thus be seen that this clause of the Constitution regarding the action of the Corporation Commission as prima facie just, reasonable, and correct has been emphasized and adhered to so often by this court that it may be said that this rule has become almost axiomatic, and, in the instant case, the rates fixed by the Corporation Commission must stand, unless we can say from the record that this presumption has been overcome by plaintiff in error. Both the record and the briefs herein, however, show that plaintiffs in error make little effort to overcome this presumption, but content themselves with assertions and arguments that the record made does not justify or support the order.

Counsel for plaintiffs in error cite and place much emphasis upon Atchison, T. & S. F. R. Co. v. State, 115 Okla. 158, P.U.R.1926C, 574, 241 Pac. 776, the second, third, and sixth paragraphs of the syllabus of which read as follows:

"Where effective and applicable freight rates on certain classes of commodities have been evolved by the Corporation Commis-

sion through years of study, after many hearings, and by means of numerous adjustments and orders, and where such rates are uniform in their application throughout the state, such rates are legal rates, under Const. art. 9, § 18, and the presumption exists that such rates are just, reasonable, and correct.

"In a proceeding brought to abrogate such legal rates and to substitute therefor special rates in favor of some particular person, corporation, or locality, the burden rests upon complainant to establish that such uniform rates are unjust and unreasonable.

"Where a special rate has been substituted in place of a general and uniform rate, no presumption exists in its favor, for the reason that the law will not indulge conflicting presumptions, and the presumption that a general and uniform rate is just, reasonable, and correct is a superior and exclusive presumption."

In that cause the finding and order of the Corporation Commission was reversed by this court for the reason, as stated in the opinion, that there was "an entire absence both of preponderating evidence and presumption to sustain the special rate granted," as distinguished from Atchison, T. & S. F. R. Co. v. State, 85 Okla. 223, P.U.R.1922D, 450, 458, 206 Pac. 236, wherein the court held: "The evidence introduced clearly sustains the findings of facts made by the Corporation Commission."

And further [in first paragraph of syllabus] held that:

"In fixing a rate to be charged by a railway company, the Corporation Commission is not confined to the sole question of the reasonableness of the rate. It may be reasonable, yet, if it discriminates in favor of one locality as against another, it should be corrected."

A careful examination of Atchison, T. & S. F. R. Co. v. State, *supra*, 115 Okla. 158, the syllabi from which are hereinabove quoted, indicates a departure from the rule consistently adhered to by this court since the adoption of our Constitution, and we now doubt whether the rule therein announced has sufficient support in the authorities to justify such departure, and shall hereafter decline to follow it.

Our attention has been called to the fact that this opinion was inadvertently published in the reports before it had in fact become final; but, while the records show that the mandate had been recalled and the cause was pending on an application to file second petition for rehearing, which application has this day been granted and the cause resubmitted, the above reference is made to that authority for the reason that it has already been published in the bound volumes of the reports, but hereafter we shall follow the rule laid down in Atchison, T. & S. F. R. Co. v. State, *supra,* which opinion is based upon and follows the numerous and consistent expressions of this court since statehood.

[3] Granting the correctness of the rule contended for by counsel for plaintiffs in error that, where established freight rates are sought to be changed, modified, or readjusted, the burden is upon the parties seeking such change to show the necessity therefor, and, granting that the legal presumption is indulged in favor of the justness and reasonableness of established rates, but after due investigation and hearing the Corporation Commission enters its findings, order, and judgment, readjusting, modifying, or reducing such established rates, the presumption as to the correctness of such order then shifts to and supports such order, and the same will not be interfered with by this court, unless it can be said from the facts appearing in the record that such action was arbitrary and that the rates fixed are unreasonable, unjust, and not raised upon the evidence, and in the instant case we cannot agree with counsel for plaintiffs in error that the record shows a state of facts which would justify this court in interfering with the order complained of, or that the same is not supported by the evidence.

The order and judgment of the Corporation Commission is, therefore, affirmed.

Branson, C. J., Mason, V. C. J., and Lester, Hunt, Clark, Riley, and Hefner, JJ., concur.

P.U.R.1928A.

GEORGIA PUBLIC SERVICE COMMISSION.

RE GEORGIA POWER COMPANY.

[File No. 16388.]

Return — Reasonableness as a whole — Railway, gas, and electric properties.

1. The return of gas, electric, and street railway properties should not be treated as a whole for the purpose of determining whether the street railway fares are adequate, p. 832.

Return — Fair value as basis.

2. The fair value of street railway property devoted to the public use must be determined in order to determine whether the company is earning a reasonable return, p. 833.

Valuation — Working capital — Necessity for allowance.

3. Working capital should be given consideration in a valuation of street railway property for rate-making purposes, p. 833.

Valuation — Going concern value — Necessity of allowance.

4. Going concern value should be given consideration in a valuation of street railway property for rate-making purposes, p. 833.

Return — Basis — Capitalization.

5. Capitalization is not the proper basis for rates, p. 833.

Return — Operating expenses — Contingent reserve — Street railways.

6. An allowance of 1 per cent of the gross revenues of a street railway system for a contingent reserve was approved, p. 837.

Return — Operating expenses — Power from other departments.

7. The charge to a railway department of a combined utility for electricity supplied by the electric department should not be less than the charge to wholesale industrial customers, p. 838.

Commissions — Jurisdiction — Wages — Street railways.

8. The Commission has no control over the question of wage increases on a street railway, p. 839.

Return — Street railways — Inadequacy.

9. A return of approximately 3.8 per cent on street railway property cannot be justified as a reasonable return, and shows conclusively that an increase in revenue is demanded, p. 839.

Rates — Street railways — Cash and ticket fares.

10. A street railway company was allowed a single cash fare of 10 cents and a ticket rate of four tickets or tokens for 30 cents, with a 5-cent fare for school children, p. 840.

Rates — Street railways — Lines outside of city.

11. A higher street railway fare is justified on a line outside of the city where the traffic density is far below the traffic density on other suburban district lines, p. 841.

Return — Operating expenses — Paving costs — Gross receipts tax.

12. Charges to operating expenses of a street railway company for street paving costs and a gross receipts tax, although not within Commission control, must be given consideration in determining a proper rate of fare, p. 842.

Rates — Street railways — Students or school children.

13. Fares for school children on a street railway were fixed at 20 tickets or tokens for $1, each ticket or token being good for one continuous ride with transfer, the sale of such books of tickets or tokens to be issued under proper rules of identification by the company, subject to the approval of the Commission, p. 843.

Valuation — Reproduction cost as measure.

Discussion of reproduction cost as a measure of value, p. 837.

Service — Street railways — Crowded cars.

Discussion of the inability of any street railway system to provide each rider with a seat during rush hours, p. 841.

(PARKER, Commissioner, dissents.)

[December 6, 1927.]

PETITION for increased street railway fares; increased fares granted.

By the **Commission:** The petition of the power company seeks an increase in car fares in what is known as the seven-mile zone, on a basis of 10 cents for cash fares, and 8⅓ cents for ticket fares. The petition of the North Side Improvement Club asks that the present fare from the city lines to Buckhead be extended to the Fulton county line. The petition of the Brookhaven chamber of commerce requests that the fare from the city lines to Buckhead be extended to the end of Buckhead-Oglethorpe line. Separate hearings were had on the petition of the Power Company, the petition of the North Side Improvement Club and Brookhaven chamber of commerce, but on account of the fact that the issues are largely the same in the three cases, the Commission has considered and will dispose of the three cases jointly.

The present rates within the seven-mile zone, which are involved in this proceeding, were prescribed by the Commission in its order, effective October 1, 1920, the fares prescribed at that time being 7 cents cash fare, or 15 tickets for $1, and also provided for a continuance of the zone fare of 6 cents on the Buckhead-Oglethorpe line, beyond Buckhead, and 5 cents be-

tween Fishers avenue and the River Terminus at the end of the River line.

In the early part of 1924, the power company submitted a petition to the mayor and council of Atlanta, seeking certain relief, and, among other things, asked the city council to approve the car fares covered by the company's petition in this case. The record shows that the city council advised the power company they had no jurisdiction over the car fares, and without expressing an opinion, for or against the petition, suggested that it was a matter to be considered by this Commission. During the proceedings before the city council, it was agreed between the company and council that a valuation and audit should be made of the company's street railway property and its records, the cost of same to be paid by the company, whereupon, the city employed nationally known engineers and auditors to do this work, at a cost of approximately $150,000.

It is contended by the company that it is not earning a reasonable return on the fair value of its property, devoted to the public use, and evidence submitted at the hearing shows a decrease in net earnings for the years 1921 to 1926, inclusive, except the years 1924 and 1925.

Protestants submitted evidence tending to show that the company is earning a reasonable return on the fair value of its railroad property. The city attorney of Atlanta contended that the street railway property and all other utility properties of the Georgia Power Company serving the public should be treated as a whole, and that should this be done, it would be found that the company is earning a fair return. The city attorney of Atlanta also contended that uniform fares should be applied within the city limits of Atlanta, and also reduced fares for school children, and additional fares to all points beyond the city limits of Atlanta. On the other hand, counsel representing protestants, located on the Oglethorpe line, contends that uniform fares should be applied throughout the railway system.

[1] The Commission has consistently held that where different classes of utility service are being rendered by one company, that, as far as practicable, these properties should be segregated, and the patrons of each class shall bear their part of the

burden of producing a return on the fair value of such property, as devoted to their use. To do otherwise, would have the effect of creating discriminations between the different classes of patrons of the company. In the instant case, it is true that many car riders do not use electric lights or gas, whereas, on the other hand, many patrons of the gas and electric departments rarely, if ever, use the street car service. It, therefore, follows that if the street railway department is not earning a reasonable return on the fair value of its property, it would be a discrimination and unfair to the users of gas and electricity to require them to pay excessive rates, to make up losses in the railway department. For the past two to three years the Georgia Power Company has been extending its light and power service to various sections of the state, until now it covers approximately two-thirds of the entire state. Thus, it will be seen, if the street railroad property is to be treated in conjunction with the gas and light and power property, people throughout the state would be called upon to contribute to the support of the street railway property, although comparatively few would ever have need for its use. Such a theory is fundamentally unsound, and has been countenanced by no court or Commission of which we have knowledge. Indeed, the city's chief witness in opposition to the power company's proposal for an increase in car fares in this case, testified that the street railway property should be treated separately. This view will be followed in a consideration of this case.

[2–5] In order to determine whether or not the company is earning a reasonable return, it is first necessary to determine what is the fair value of the street railway property devoted to the public use, on which the company is entitled to earn a reasonable return. In this case, the company submitted various values. What is known as the historical, or cost value, is based upon the value found by engineer Baehr, in his appraisal as of March 18, 1912, which was made with the intention of leasing the properties of the Georgia Railway & Electric Company to the Georgia Railway & Power Company. The physical property, as found by engineer Baehr at that time, excluding jointly used property, but including overhead charges, was $8,766,673.91. Additions and betterments to the property, not including jointly

used property, from 1912 to December 31, 1926, amounted to $7,378,162.99, making a total historical cost value of the physical properties, excluding jointly used property, but including overhead charges, as of December 31, 1926, $16,144,836.90. Based on this historical cost, and adjusted to prices current as of January 1, 1927, less accrued depreciation, gives a value of $21,989,421.

The record shows that engineer Baehr made another appraisal of this property, as of July 1, 1921, and the physical value found by him on that date, reproduction cost new, less depreciation, was $17,813,099. Additions and betterments to the property from July 1, 1921, to December 31, 1926, amounted to $4,805,865, or a total value, less accrued depreciation, of $22,618,964. The value found by engineer Beeler, in his appraisal for the city of Atlanta, excluding jointly used property, with additions and betterments to December 31, 1926, is $19,614,216.

Engineer Luick, who testified in the present case, submitted an appraisal as of January 1, 1927. Mr. Luick's physical value as of that date, less depreciation, and excluding jointly used property, was $20,402,860. The physical value found by Mr. Luick, less depreciation, including jointly used property, as of January 1, 1927, was $22,885,039.

It will be seen that all values above referred to do not include any amount for working capital or going concern value, which should be given consideration for rate-making purposes. Engineer Luick took the position that $450,000 should be allowed for working capital and $2,500,000 as going concern value, in the present case.

There has been prevalent in Atlanta and adjacent territory, where the present application and those of 1918 and 1920 have been generally discussed, a view that capitalization is one, if not the controlling factor in arriving at a proper valuation for a rate base; that this Commission has, in the past, prescribed rates to yield a return on the capitalization of the applicant in this case, which it is claimed, is very excessive. The Commission did not in 1918, 1920, nor has it in this case, considered capitalization as a basis for the rates herein approved. The fair value of the property used and useful, is the only basis this Commission

has at any time considered for this company, or any other company over which the Commission has jurisdiction, in arriving at a fair value to determine a fair return.

The first case coming to the Commission concerning the street railway business of applicant was in 1918. We were in the midst of the World War, with all the uncertainties, as every one knew would follow the cessation of the war, just as we had experienced in the outbreak of the war. The Commission, like other Commissions, as well as the public generally, believed that emergency rates were proper, entertaining the hope, at least, that as soon as the war was over normal conditions would be re-established. With this thought in mind, the Commission was content to use what it defined in 1918 as the minimum value of the property of the applicant in this case. Among other things, in explanation of this minimum value, the Commission said, in the 1918 case, File No. 13946, P.U.R.1918F, 624, 630: "The company may complain at our use of a minimum value, rather than the fair value, but certainly the public cannot." The use of a minimum value, as well as providing what the Commission thought would be an emergency return, was continued through the 1920 case, File No. 13946, P.U.R.1921A, 165. Instead of a restoration of pre-war prices in labor and material, there has resulted what appears to be and vouched for by the best trained minds in the country, a stabilization of prices at a much higher level than obtained prior to the war.

During the time the Commission was fixing rates for this company's street railroad, on a minimum value, and prescribing a lower rate than the evidence showed to be justified, very scant returns were experienced. There has been no consideration given the street railway property of applicant by this Commission since the 1920 case, *supra,* when the rate was increased from 6 cents to 7 cents, with a ticket rate of 15 tickets for $1.

Having in mind the consideration given by this Commission of applicant's street railroad property, it is not surprising that in December, 1924, John A. Beeler, consulting engineer of the Beeler Organization of New York city, found occasion in his report to the city of Atlanta, dealing with street railway property of applicant, to express himself as follows: "With these

rates of fare under the present operating conditions, eleven of the twenty-two railway lines are not taking in sufficient to pay the operating expenses. If this condition is not speedily righted, it is evident that the railway will not continue to function properly, and will be unable to finance itself. To properly care for the growth and development of the community, the additions and improvements outlined in this report, must be made. This involved large expenditures, as is shown further along. To obtain the necessary funds, the financial condition of the railway must be radically changed. To accomplish this, either the revenues must be increased or the expenses decreased, or both. As shown elsewhere in this report, the net earnings this year (1924) are estimated to be $566,358, or sufficient to pay a return of 8 per cent on but $7,090,000. The discrepancy between these earnings and those necesssary to place the railway on a sound footing is so great that the seriousness of the present situation is obvious. There is no time to permit of any unnecessary delay in adopting effective corrective measures, drastic though they may be. If the chief transportation agency of the community is to be paralyzed, it is not to be imagined for an instant that the results will stop there. The whole social, commercial and industrial fabric is dependent upon the proper functioning of the local transportation system, for it is to the community what the circulatory system is to the human body. Interfere with it and disaster is invited; kill it, and the community dies with it."

It will be recalled that the Beeler Organization was engaged by the city of Atlanta to undertake a solution of the transportation system in Atlanta, and it is from a report thus made, at pages 65, 67, and 68, that the above quotation is taken.

The Commission in 1918 and 1920, when the street car fare cases were before it, dealt with it, as above indicated, in such manner that the company might have complained, but the public could not. Experience has demonstrated that the Commission was too conservative in its judgment of what the future would reveal, with the result that but for the sustaining credit and support of the light and power and gas properties of applicant, the street railway business would have long since been paralyzed.

As already stated, the street railroad property should hence-

forth bear its own burdens. It is not right for the large area throughout Georgia, now paying a return on the light and power property of this company, as well as the gas consumers in Atlanta and adjacent territory, who do not use the street railroad, to be required to pay a return, in part, on the street railway department.

There appears to be a common belief in the community served by the street railway department that the highly maintained property in the way of roadway and equipment, is all sufficient evidence that the street railway department has been prosperous, else this highly maintained condition would not exist. Nothing could be more erroneous. It is also apparent that there is a general belief that the large number of new cars purchased by this company during the last three to four years comes out of earnings, which is another error and without any foundation for its support.

The Supreme Court of the United States, to our mind, has not been as definite in prescribing rules as a guide for arriving at a fair value as a proper rate base, as we believe should have been done. However, considering their expressions on this subject as a whole, it is very clear that they lean more to the reproduction cost new theory than to any other method. It is our belief that a strict adherence to the reproduction cost new theory would not be best for the company, nor the citizens it serves. Conditions could happen, as they have happened in the past, which, to apply such a method, would work disaster for the company as well as a hardship on the public, in so far as such would result in the loss of service. Such a theory, if applied in the last half of 1914, 1915, and 1916, would have bankrupted most of the companies throughout the country. However, taking the rates as approved in this case, applied to 1926 business, will not yield more than a reasonable return on a valuation far below the application of the reproduction cost new theory, plus going concern and working capital.

It is our opinion that the value of the street railway property under consideration in this case, as of December 31, 1926, is not less than $20,000,000 for rate-making purposes.

[6] At the close of the hearing of this case the Commission

employed the Audit Company of the South to make an audit of the records of the company for the years 1924, 1925, and 1926, or subsequent to the audit which had been made by the auditors employed by the city of Atlanta. The report of the Audit Company to the Commission is in conflict with the company, particularly with regard to items of expense. This is covered largely in the matter of the distribution of taxes between the various departments of the company. The auditor does not agree with the company in the distribution of certain tax items, which results in increasing the company's net revenues as of 1926, in an amount of approximately $150,000, as compared with the net shown by the company. The auditor's report shows that the depreciation charged, or renewal reserve, as set up in the company's books, are not excessive, by way of comparison, with the actual amount used for this purpose each year. The report also shows the company charged to operating expenses, for contingent reserve, 1 per cent of its gross revenues, and an analysis of this account by the auditor shows that this amount is not unreasonable.

[7] At the hearing, it was claimed by some of the protestants that the amount charged to the railway department for power is unreasonable, their position being that the electric department should not charge to the railway department any more than the actual cost of producing the power. The record shows that the electric department is charging to the railway department, 1 cent per kilowatt hour for the amount of power used by the railway department, this being the minimum rate authorized by the Commission to be charged to wholesale industrial customers. Should the Commission require the electric department to charge less to the railway department for power than it charges to wholesale industrial customers throughout the state, it would have the effect of converting to the use of the street railway patrons property of the electric department, without paying any part of the return on such property. It would, therefore, follow that under such a method of distribution of cost, it would become necessary to increase the rates of the Electric Department, in order to give

it a reasonable return, and would work a discrimination against the electric consumers throughout the state, as well as locally.

One of the largest items of expense in the railway department is that of transportation cost, represented largely in the wages of motormen and conductors. The following shows the wages paid motormen and conductors during the years 1914, 1920, and 1926, as compared with the average cost of living in Atlanta during these years, using the wage scale and the living cost, as prevailed in 1914, as 100 per cent:

	1914. Wages per hour.	1920. Wages per hour.	1926. Wages per hour.
Motormen and conductors	25¢—100%	46¢—183%	59¢—238% 54¢—215%
Cost of living	100%	210%	168%

[8] The record shows that the increase in wages, shown in the above statement, was made by arbitration. The wages shown in the record for 1926 are 54 cents per hour for two-man cars and 59 cents per hour for one-man cars. The Commission, of course, has no control over this question.

The following is a statement of revenues and expenses for the year 1926, as shown by the auditor's report:

Revenues		$5,278,794.84
Operating Expenses	$3,720,165.96	
Taxes	413,156.53	
Depreciation	394,192.25	
		$4,527,514.74
Net		$751,280.10

[9] Based on a value of $20,000,000, the above net revenue represents a return of approximately 3.8 per cent on the street railway property of applicant, which cannot be justified as a reasonable return, and shows conclusively that an increase in revenue is demanded.

No one can tell with exact precision the number of people who will ride on the street cars of applicant for the next twelve months, but whatever the number be, if it develops that the rates provided yield a return greater than it is now the opinion of the Commission will be experienced, the Commission can and will give further consideration to the matter at that time.

No one can tell in this community, or in any other community, the number of passengers who will pay a cash fare. Experience has demonstrated that approximately 10 per cent pay a cash fare, with even a less spread between the cash fare and the ticket rate than here provided, and of course it follows that the greater the spread, the greater number who will buy tickets rather than pay a cash fare.

The Commission, considering the scant earnings of this company for a long number of years, does not feel justified in doing less than has been concluded to be reasonable, but at the end of twelve months from the effective date of the order to be issued in this case, the Commission will give consideration to the earnings of the company under the new scale of rates, and if conditions are such at that time as are, in the opinion of the Commission, justified, the Commission will of its own motion, take proper steps to make due corrections, just as it had done in the past in dealing with applicant's property, where reductions resulted.

Experience has demonstrated beyond question, that the Commission in the 1918 and 1920 cases, P.U.R.1918F, 624; P.U.R. 1921A, 165, fixed a fare too low. If the Commission had provided a reasonable fare in 1918 and 1920, this application would have had no excuse for existence at this time. It may appear to some as unfortunate that this was not done, but be that as it may, the patrons of the street railway department of this company have enjoyed a fare for the past nine years that experience has shown to be too low.

Of the two witnesses consuming most of the time at the hearing of this case, by way of comparison, in opposition to the rates applied for, a maximum fare of 10 cents for a single ride was proposed by each witness, with differing opinions as to a ticket rate. Considering the great mileage, compared with population, and the transfer privileges, there is no kind of transportation for the occasional rider that will approach in value the single car ride for 10 cents. No one will have to pay this fare who rides even occasionally, because of the opportunity to buy tickets.

[10] It is the opinion of the Commission that a single cash

fare shall be 10 cents; that the ticket rate shall be four tickets or tokens for 30 cents, except as otherwise provided for in the order, and a 5-cent fare for school children, under conditions as set forth in the order to be issued in this case; and also except a fare provided for the Buckhead-Oglethorpe University line. The record in this case shows that there are 208 cities scattered throughout the country that are now charging a cash fare of 10 cents, and 22 of these cities are charging a zone fare of 10 cents.

[11] As to the Buckhead-Oglethorpe University line, it would be desirable to have a uniform fare applying on the city lines, to be extended to this line, but the conditions in the territory served by this line are so entirely different from the conditions surrounding the College Park-Hapeville and Decatur lines, that a uniform fare cannot be justified. The section from Buckhead to the county line is fairly well settled with residences, but the record shows that this line is not being used to the extent of the College Park-Hapeville and Decatur lines. In other words, the traffic density on the Oglethorpe line is far below the traffic density on the other suburban district lines, and therefore, it is proper that consideration be given to a higher fare beyond Buckhead on the Oglethorpe line.

It is the opinion of the Commission that the maximum fare to be charged by the Georgia Power Company to and from all points on its Buckhead-Oglethorpe University line, north of Buckhead, including transfers to and from the Atlanta city lines, as now in force, shall be 16 cents, or 10 tickets or tokens for $1; and that the maximum fare to be charged by the Georgia Power Company between Buckhead and all points on its Buckhead-Oglethorpe University line, north of Buckhead, shall be 10 cents, or 15 tickets or tokens for $1, these fares not to include transfers to and from the main Buckhead-Atlanta line.

It is our opinion that the Georgia Power Company is now rendering the best street car service in its history, and certainly far in excess of any period experienced by any of its predecessors. True, there are undesirable experiences during the rush hours, morning and evening, as are experienced in all cities and as

will ever be experienced. This condition can be relieved from time to time, but it will never be completely overcome by any street railway system to the end that every rider will at all times, be provided with a seat.

The service now rendered by the applicant is due in no small degree to the splendid personnel in the operating department; the motormen, conductors, and other employees in the railway department being composed of as high a type of men as will be found anywhere in the United States.

[12] As shown by the record in this case, and which is common knowledge to most of the patrons of the street railroad in Atlanta and adjacent territory, this company operates under conditions which prevail in comparatively few cities throughout the country. The physical values of the street railroad property include approximately $4,000,000 for paving the streets traversed by the various lines of applicant, which is required under franchises. It is also shown from the record that the company is required to pay to the city of Atlanta a gross receipt tax of 3 per cent of all revenues taken in. As a result of this street paving cost, there is charged to operating expenses approximately $100,000 for depreciation, and there is included in the return resulting from the rates approved herein, $280,000, or a total of $380,000, which must be paid by the car riders on account of this street paving cost. As a result of the 3 per cent gross receipt tax, there is to be charged to expenses approximately $180,000. In other words, there is to be added to operating expenses, which results in a deduction from the net income, $560,000 per annum, due to the paving charges and gross receipts tax. These necessary charges to operating expenses are conditions over which the Commission has no control, but at the same time it is obviously necessary that consideration be given to these items of operating costs, in determining such a rate of fare as is necessary under conditions enumerated herein.

Another unusual condition, and one which is beyond the control of this Commission, is the 5-cent contract fare on the main Decatur line. The total earnings of the street railway department for the year 1926 were $5,278,794.84. If the 5-cent fare

which prevails on the main Decatur line had been in effect on all lines of the company, the gross earnings would have been $3,795,062.05. The total operating expenses, as found by the Commission's auditor, for the year 1926, were $4,527,514.74, and, therefore, if the fare enjoyed by the patrons on the main Decatur line had been in effect on all lines of the company in 1926, the company would have failed in the amount of $732,452.69 to take in sufficient revenue to pay actual operating expenses. As previously stated, the net income of the street railway department for the year 1926 was 3.8 per cent on a value of $20,000,000, and it, therefore, follows that while this return is not reasonable, the entire amount was paid by patrons of the street railroad, other than those who patronize the main Decatur line on a 5-cent fare; and it follows further that the patrons of the main Decatur line at a 5-cent fare are not paying the actual cost of the service. As above stated, these conclusions are based on the facts as revealed by the Commission's auditor's report.

[13] As a condition to the exercise of authority in charging the rates hereinabove found to be reasonable, the Commission has reached the conclusion that the maximum fare to be charged by the Georgia Power Company, within what is known as the seven-mile zone, for students or school children on school days, attending the grammar or high schools, shall be 20 tickets or tokens for $1, each ticket or token being good for one continuous ride, with transfer, the sale of such books of tickets or tokens to be issued under proper rules of identification by the company, subject to the approval of the Commission. This is a new departure in prescribing fares for school children for this company, but it is being done in other cities of the country, and the Commission feels that such a practice should be enforced in Atlanta. [Order omitted.]

P.U.R.1928A.

INDIANA PUBLIC SERVICE COMMISSION.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN et al.

v.

ALL RAILROADS OPERATING IN INDIANA.

[No. 8918.]

Railroads — Tracks and tunnels — Guard rails.

The use of guard rails between tracks running through tunnels would not be a safety measure such as would afford protection against trains side-swiping the walls of the tunnels, but the use of such rails would increase the difficulties attendant upon the placing of locomotive engines and cars back on tracks in cases of derailment, would unnecessarily increase the hazards of railroading in the operation of freight trains through tunnels, and would not afford any appreciable amount of protection to the train crews operating trains through them.

[July 1, 1927.]

PETITION by a Brotherhood of Locomotive Firemen and Enginemen to require guard rails between tracks running through tunnels; denied.

Appearances: R. H. Harrington, Brotherhood of Locomotive Engineers, A. E. Gordon, Brotherhood of Locomotive Firemen and Engineers, E. H. Kenney, Order Railway Conductors, for petitioner; John Wellman, Attorney Southern Railway Company, F. G. Fallas, Southern Railway Company, J. F. Sheridan, Superintendent, Southern Railway Company, H. G. Tyrrell, Southern Railway Company, E. H. Patrick, Chicago, Milwaukee & St. Paul Railroad Company, for respondents.

Harmon, Commissioner: Certain railroad organizations, namely, the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Engineers, the Brotherhood of Railway Trainmen, Order of Railway Conductors, filed their petition in this cause, in which petition they asked that all railroad companies operating within or through the state of Indiana having tunnels through which passenger and freight trains operate, be required to install guard rails between the rails of the railroad tracks running through said tunnels, which petition is in the words and figures following, to wit:

"1. The undersigned, on behalf of the above petitioners pray your Honorable Commission to require, by an official order, or otherwise, any and all railroad companies operating within or through the state of Indiana, having tunnels through which passenger and freight trains are operated, to install guard rails between the rails of track running through tunnels.

"2. That, said guard rails to be safe and suitable, be specified to be not less than ten pounds less per yard in comparison to the stock rails used in the track, securely spiked on each side of the guard rail to the cross ties.

"3. That, said guard rails will afford protection in case of derailment in said tunnels, in that the guard rails will tend to prevent the derailed engine or cars from side-swiping the walls of the tunnel."

Notice of the filing and pendency of said petition was duly given to each, the Southern Railway Company, the Monon Railroad Company, and the Chicago, Milwaukee & St. Paul Railroad Company, the said three railways being the only ones in Indiana having tunnels on their lines.

The petition was set for hearing on June 16, 1927 at the rooms of the Commission, Indianapolis, Indiana and due and legal notice was given accordingly.

On the hearing it was shown to the Commission that there were eight tunnels in the state of Indiana, and that each of said tunnels had been in existence for more than twenty-five years. That during all of said twenty-five years, but two accidents have occurred in any of said tunnels, namely, a derailment on the Southern Railway in the year 1913, and a later derailment on said Southern Railway in the year 1922. That in neither of said accidents were any persons killed or injured and that neither of said accidents could have been averted by the use of guard rails.

It was further shown to the Commission that the use of guard rails in tunnels would probably increase the difficulty of putting engines and cars back on the railroad track in case of derailment for the reason that the spikes holding the guard rails would have to be removed from said guard rails and the guard rails

taken away before the ordinary devices now in use for placing derailed cars and locomotives back on the track could be operated successfully, and that the use of guard rails in case of derailment would result in long and serious inconvenience.

It was also shown that the use of said guard rails was not considered good engineering practice in tunnels, the purpose of the guard rail ordinarily being to prevent the cross ties on which rails are placed from piling or bunching up in cases of derailment.

It was also shown to the Commission that there was probably no statutory authority in the state of Indiana authorizing an order to be made requiring guard rails to be placed in said tunnels.

In view of all the foregoing, the Commission finds that the use of guard rails between tracks running through tunnels would not be a safety measure such as would afford the protection alleged in the petition, but, that on the contrary, the use of such rails would increase the difficulties attendant upon the placing of locomotive engines and cars back on tracks in cases of derailment, would unnecessarily increase the hazards of railroading in the operation of freight trains through tunnels and would not afford any appreciable amount of protection to the train crews operating trains through same.

Singleton, McCardle, Ellis, McIntosh, Commissioners, concur.

Note.—The Arizona Commission, in investigating a wreck between an extra engine used for switching and a passenger train, concluded that a zone rule abrogating superior rights of trains within a zone was a contributing factor of considerable proportions in making possible the conditions resulting in the wreck. The Commission further concluded that the practice of interpreting rules at variance with the written provisions thereof was a contributing factor, and that this practice should be immediately discontinued. The Commission said that if a rule is found impracticable or unworkable, it ought to be modified or repealed, but while it remains on the books, it should be observed. Re Atchison, T. & S. F. R. Co. Docket No. 2856–R–243, Decision No. 4089, June 24, 1927.

In Re Eternit and Chicago, B. & Q. R. Co. Case No. 5240, July 11, 1927, the Missouri Commission denied approval of the construc-

tion of a cement unloading building with less than the standard clearances as set out in the Commission's General Order No. 24 providing for a vertical clearance of 22 feet from the track, and a horizontal clearance of 8 feet 6 inches from the center line of the track on the ground that while the proposed unloading building would undoubtedly be slightly more practical, the applicant had failed to show that conformance to the general order would either be impracticable or would defeat the purpose for which the building was to be constructed. The Commission however, was of the further opinion that, when protected by proper warning signs, the unloading platform inside the building could be constructed with a horizontal clearance of six feet at a height not greater than four feet above the top of rail.

INDIANA PUBLIC SERVICE COMMISSION.

RE MADISON LIGHT & POWER COMPANY.

[No. 9098.]

Rates — Increase of minimum charge — Cost of hearing — Petition of consumers — Electricity.

A petition for the increase of a minimum monthly charge signed by most of the consumers of an electrical utility was dismissed at the request of the latter in view of the fact that the expense of a hearing required by law would be greater than the relative advantages derived from the increase.

[November 4, 1927.]

PETITION of the consumers of an electrical utility for an increase of minimum rates; dismissed.

McCardle, Commissioner: On September 8, 1927, Henry M. Lee, et al., inhabitants of the town of Hanover, Indiana, filed with the Public Service Commission of Indiana a petition, which, omitting caption and signatures, is in words and figures following, to wit:

"We the undersigned residents of the town of Hanover receiving electric service from the Madison Light & Power Company, in consideration of receiving the benefits of a reduced electric lighting rate from 12 cents per kilowatt hour net to 11 cents per kilowatt hour net for the first 100 kilowatt hours used per month

and further reductions for electric current used in excess of 100 kilowatt hours per month based on the lighting rate in the city of Madison plus a 1 cent per kilowatt hour differential, hereby consent to an increase of the minimum monthly charge now in effect in the town of Hanover from $1 per month to $1.25 net per month, which is the minimum monthly charge now in effect in the city of Madison."

It appears, and the record discloses, that the Madison Light & Power Company of Madison, Indiana, generates and furnishes current to the inhabitants of the town of Hanover, Indiana; that over 80 per cent of the consumers of electric current in Hanover signed a petition for an increase of the monthly minimum charge from $1 to $1.25 per month, all other charges for electric current to the consumers in the town of Hanover, Indiana, having been reduced. The Shively-Spencer Utility Act provides that no increased schedule of rates and charges should be authorized by the Commission without first giving ten days notice and holding a public hearing in the cause, at which time all parties at interest could be heard.

Subsequent to the filing of said petition, on October 31, 1927, the Commission received from M. F. Tennis, manager of the Madison Light & Power Company, the following communication:

"Re: Cause #9098,

Lighting Service for Town of Hanover.

"Referring to our lighting schedule No. 20 filed September 8, 1927 covering reduced lighting rates for the town of Hanover, in which, however, the minimum monthly charge was increased from $1 net to $1.50 gross and $1.25 net, thereby constituting an increased rate, we wish to advise that in view of the small amount of revenue involved, our company feels that the expense of a hearing in this case would be more than the increased revenue to be derived and are, therefore, submitting herewith revised schedule of lighting rate for the town of Hanover in which we are substituting the old minimum monthly charge of $1, thereby eliminating any increased rate for that town as well as all of the towns and communities served by our company, and we trust,

therefore, that all of the reduced lighting and power schedules recently filed by our company will now be in line for final approval by the Commission."

It appears that, since a large majority of the consumers of current in the town of Hanover signed the petition for increase of the monthly minimum, a situation of unusual importance confronts the Commission, the legality of which will not at this time be determined.

The Commission, being fully advised in the premises, is of the opinion and finds that no inconvenience or burden is imposed upon the consumers of current in the town of Hanover, since petitioner Madison Light & Power Company has re-established the old monthly minimum of $1; that the petition of Henry M. Lee, et al., residents of the town of Hanover, Indiana, filed September 8, 1927, should be dismissed, and it will be so ordered.

Singleton, Ellis, Harmon, McIntosh, Commissioners, concur.

Note.—Rates.

I. Value and cost of service affecting reasonableness, 849.
II. Rates of particular utilities:
a. Railroad, 850.
b. Street railway, 851.
c. Telephone, nonsubscriber charge, 852.
d. Water, 851.
III. Test periods, 852.

I. Value and cost of service affecting reasonableness.

In Re Tri City R. Co. No. 17516, Oct. 5, 1927, the Illinois Commission approved a considerable increase of fares of a street railway utility upon a showing that the company was not making its operating expense. The Commission did not fail to take into consideration the point of diminishing return through deflected patronage but believed that the acuteness of the situation demanded firm and immediate action. The Commission stated: "In the order in Case No. 15167 the Commission ordered to be placed in effect a modified schedule of rates, having in mind that the schedule then proposed by the petitioner might defeat the purpose which it sought to accomplish. It appears, however, that the above named schedule did not produce the desired effect on the car riders of the cities affected. The Commission is impressed with the fact that a serious emergency

still confronts the petitioner which the various remedies applied have failed to relieve and for this reason will authorize the increased schedule of fares named in Ill. C. C. 7 to be made effective October 15, 1927."

The Indiana Commission allowed an increase in rates of a natural gas utility without establishing any valuation of the utility property, the purpose of the increase being to allow improvements of service. Evidence showed that the supply was being depleted and that the present service was inadequate, and further that considerable expenditure was necessary to secure a new supply. The Commission pointed out that the present rates were very low and that the complaints from consumers were mostly about the supply and service and not concerning cost. Re Interstate Public Service Co. No. 8631, Oct. 22, 1927.

The Indiana Commission, upon evidence showing an improved and adequate service, placed in effect a schedule of rates of a telephone utility which had been suspended by a prior order (Wilson v. Prairie Teleph. Co. P.U.R.1927E, 271) upon a showing of very poor and unsatisfactory service and the decreased rates ordered. The subsequent hearing brought out the fact that faults in the service had been improved and remedied, and the Commission, in commenting upon the appellate rights of the utility, stated: "This order has been appealed from and the appeal is now pending. It is not the intention of the Public Service Commission to interfere in any manner with the proper determination of said appeal. However, in the latter part of said order a statement was made as follows: 'As soon as a satisfactory showing shall be made that the service furnished by said Prairie Telephone Company is satisfactory, the rates in force at the time of this order may be on such proper showing restored.'" Wilson v. Prairie Teleph. Co. No. 8957, Oct. 7, 1927.

II. Rates of particular utilities.

a. Railroad.

The Louisiana Commission dismissed a complaint to have through rates applied upon shipment of bottles originally consigned to a certain station where it was rejected for poor condition by the company and thereupon reconsigned to another station further up the line. The Commission justified the rate procedure of the carrier with the following statement: "We think that complainant has inadvisedly used the term 'reconsigned' in his petition. Reconsignment contemplates that notice of diversion from the original point of destination to some other point be furnished the carrier by the shipper while the car is actually en route and before placement is made. In the case before us the car was actually placed on the consignee's track, at its warehouse, the seals broken, and the damaged

condition of the lading ascertained. This discovery brought about the rejection. The car was then moved on new billing from Baton Rouge to Lafayette. Therefore, as we see it, two distinct transportation services were performed, and to each the lawful rate was applied." Shreveport Chamber of Commerce v. Kansas City S. R. Co. No. 758, Order No. 468, Nov. 10, 1927.

The Louisiana Commission, in Shreveport Chamber of Commerce v. Railroads, Order No. 467, No. 852, Nov. 10, 1927, dismissed a complaint against railroad carriers for rates on the carriage of concrete pipe. The Commission said: "Hearing on the matter was had at New Orleans on September 22, 1927. It was stated by a witness for the carriers, and not contradicted by the witness for the complainant, that the individual manufacturer in whose behalf the Shreveport Chamber of Commerce brought this complaint also has plants in the state of Arkansas where it manufactures concrete pipe, and that in Docket 18812 of the Interstate Commerce Commission this same complainant has put at issue, as being discriminatory and preferential to Louisiana intrastate shippers, the existing scales in Louisiana. Under this state of facts we cannot with any degree of consistency favorably entertain the complaint now before us. We think the best interests of all concerned will best be served by dismissing this complaint."

b. Street railway.

In Re United Electric R. Co. Order No. 1176, Aug. 31, 1927, the Rhode Island Commission approved the extension by a street railway of one of its zone limits about 700 feet to accommodate the pupils of a high school which was that distance west of the old limit, inconveniencing all passenger pupils originating east of it.

c. Telephone, nonsubscriber charge.

A utility was ordered to amend its schedule of rates by eliminating therefrom the charge of 50 cents per month per phone for residence telephones where the use of such was available by an additional family and the charge of $1 a month for the use of business telephones where such telephones were to be used by additional business subscriber. Patrons v. Coffey County Teleph. Co. (Kan.) Docket No. 8992, June 11, 1927.

d. Water.

The Indiana Commission approved a petition of the water department of a city to extend a summer schedule of rates through the months of May and October upon a showing that the soil in the vicinity was very sandy and, in order properly to prepare it for the growing of grass, an excessive amount of water was necessary, and for the further reason that dry weather often prevailed during the

months of May and October. Re Water Department of East Chicago, No. 9127, Nov. 4, 1927.

III. Test periods.

In Re Springfield Gas & E. Co. Case No. 1784, Oct. 29, 1927, an electric utility in compliance with a previous order had filed an operating report for the preceding twelve months showing that the company was making an unreasonably excessive return on the value of the property used and useful in public service. The Missouri Commission accordingly ordered that the energy or condensation charge be reduced approximately 5 per cent.

An application of a telephone utility to increase its rates to certain proportions was accompanied by a petition of the subscribers and a resolution of a city Commission indicating their willingness to pay the proposed increase, if the Commission should find such rates justified. As various improvements were contemplated the Commission could not definitely determine what the results of the rates would be, but believed that it would be to the interest of the public, and all the users of the local and long distance facilities located at the city in question to authorize increased rates until such a time as an analysis of the results of such operation might suggest modification in the rate schedule. Re Southwestern Bell Teleph. Co. (Okla.) Cause No. 8118, Journal Entry No. 1537, July 15, 1927.

MAINE PUBLIC UTILITIES COMMISSION.

MILLARD I. PARKER et al.

v.

CENTRAL MAINE POWER COMPANY.

[F. C. 621.]

Service — Extensions — Utility territory.

1. An electric utility should extend its lines to render service within the territory which the company undertakes to serve if the extension can be made without placing any undue burden on the company's other patrons, p. 855.

Service — Extensions — Guarantee of revenue.

2. An electric utility should not be required to make a comparatively large investment necessary for service to a group of new patrons without some assurance of reasonably adequate revenue for a definite length of time, p. 855.

[March 17, 1927.]

COMPLAINT against the refusal of an electric utility to extend service; extension ordered on conditions.

P.U.R.1928A.

Appearances: Millard I. Parker, for himself and other complainants; Everett H. Maxcy, for Central Maine Power Company.

By the **Commission:** Complaint of Millard I. Parker and 27 others, residents of Hallowell, Farmingdale, and West Gardiner, against the Central Maine Power Company, praying that the service of the respondent company be extended to the petitioners and others.

On this complaint, after preliminary notice and investigation, a public hearing was held at the offices of the Public Utilities Commission in Augusta on August 25, 1926 at 10 o'clock in the forenoon.

The complainants in this case live along the Litchfield Road, so-called. The proposed extension begins at the present terminus of the 2300-volt single-phase line of the respondent company and extends in a westerly direction from Hallowell through Farmingdale to West Gardiner four corners, a distance of 5.0 miles, and northerly along a spur road .92 mile from the four-corners to the residence of K. R. Collins.

Joint construction may be used on a new 30-foot pole line of the New England Telephone & Telegraph Company which extends along the proposed line for a distance of 1.9 miles, and on a new 25-foot pole line of the same company for a further distance of 1 mile; but new construction will be required for the remainder of the line.

Testimony was given at the hearing by Mr. Parker and others tending to show that there is a demand and necessity for the proposed extension of service, and indicating the probable use that would be made of the service if offered.

Mr. Frederick W. Eaton, operating engineer for the Central Maine Power Company, testified in regard to the investigation and the estimates of cost which had been made by the company.

Subsequent to the hearing, Mr. Eaton filed with the Commission a detailed estimate of the cost of the proposed extension as far as West Gardiner four-corners, showing a total estimated cost of $7,430.22. These figures were based upon the assump-

tion that joint construction with the telephone company would be used on the first 2.9 miles of the proposed extension.

Subsequently, an investigation was made by the engineering department of the Commission, and detailed reports showing estimates of cost are on file with the case. The estimates of the Commission's engineers show a total cost of the proposed line to West Gardiner four-corners of $6,691.16, and a total cost to the end of the spur line of $7,911.04. These estimates were also made upon the assumption that joint construction with the telephone company would be used for the first 2.9 miles.

Estimates were also made by our engineers on the assumption that the customers would contribute labor on the proposed new construction showing the cost to the four-corners to be $5,339.78 and for the total distance, including the spur line, to be $6,420.52. Inasmuch, however, as no definite offers were made at the hearing or have been filed with the Commission since the hearing relative to contributions of labor, the decision and order in this case are made upon the assumption that the entire expense for labor and material for the proposed extension will be borne by the company.

The company's engineer estimates the probable normal annual revenue from the extension as far as the four-corners to be $600, and the required revenue from the company's standpoint to be approximately $1,800. The probable number of customers at the beginning on this extension, including the spur line, is 44. Nineteen other residences not included in this estimate are located along this line. If the proposed extension be made, a further demand for service from the occupants of some of these residences may reasonably be expected. The normal annual revenue from 44 patrons, based on the estimated average of $20 each, will be $880 for this entire extension. Approximately the first half of the proposed extension is rather sparsely settled, with the residences in general some distance apart; but along the remaning distance to the four-corners and along the spur road the houses are located much nearer together—oftentimes in groups, so that a smaller number of transformers in comparison with the number of subscribers will be required.

We are of the opinion—based upon our investigations and

the evidence submitted in this case—that an annual revenue somewhat in excess of the estimated $20 per customer may reasonably be expected from the subscribers along the proposed extension, with some additions to revenue from other subscribers who have not yet indicated their desire for service.

[1, 2] The proposed line extends through a fairly prosperous and comparatively thickly settled community with an evident demand and necessity for the service of the respondent company. As the location of the proposed line is in the territory which the company undertakes to serve, the requested service should be offered by the company if the extension can be made without placing any undue burden upon the company's other patrons. The company ought not, however, to be required to make the comparatively large investment necessary in this case without some assurance of reasonably adequate revenue for a definite length of time.

After investigation and careful consideration of all the evidence submitted in this case, we find that the company is entitled to a gross annual revenue of not less than $1,450 and we shall require the extension to be made if that amount of revenue can be guaranteed for a period of five years.

It is accordingly

Ordered, Adjudged and Decreed

(1) That the Central Maine Power Company extend its single-phase distribution line from the present terminus of its 2300-volt single-phase line at Hallowell westerly along the Litchfield Road for a distance of 5 miles to West Gardiner Four-Corners, and thence in a northerly direction along the spur road .92 mile to the residence of K. R. Collins so as to furnish electric current for light and power to the people along said roads. The work of making such extension shall be commenced within thirty days after the contracts and guaranties mentioned in paragraph (2) of this order shall have been tendered to and accepted by said company or approved by this Commission, and shall be completed with reasonable diligence. *Provided, however,* that the company shall not be required to make such extension at a season of the year when frost conditions would cause an undue additional cost of construction.

(2) Before said company shall be required to comply with the terms of the foregoing order, the parties desiring said service or some of them shall tender to the company written contracts or guaranties satisfactory to the company or approved by this Commission, guaranteeing to the company a monthly minimum gross operating revenue of not less than $120—adjusted at the end of each twelve months' period to a yearly minimum gross operating revenue of not less than $1,450—for a period of five years from the date that said company is in readiness to supply all of the service hereinbefore required. Service shall be furnished in accordance with the company's published schedule of rates, subject however to the payment of the guaranty herein provided.

(3) That said company report to this Commission at the time the work on the extension is begun and within thirty days after the completion of the work, said latter report stating in detail the costs of making the extension herein ordered.

(4) That a copy of this order, attested by the clerk of this Commission, be sent postpaid by registered mail to Everett H. Maxey, Esq., Augusta, Maine, attorney of record for said company, and to Mr. Millard I. Parker, R. F. D., Hallowell, Maine, one of the complainants, who represented the complainants at the hearing in this case.

Note.—Service.

I. Duty to serve:
a. Extensions, 856.
b. Abandonment or discontinuance of service:
1. Railroad station agency service, 857.
2. Inadequate return. 859.
3. Improper action of patrons, 859.
II. Meters, 860.
III. Service by automobile, 860.

I. Duty to serve.

a. Extensions.

The Wisconsin Commission, in Coolidge v. Wisconsin Teleph. Co. U–3606, Oct. 31, 1927, refused to compel service by a telephone company whose line passed the door of the complainant, a dissatisfied former subscriber of another company. It was pointed out that no complaint had been made by the subscriber to the Commission of P.U.R.1928A.

the alleged inadequacy of service rendered by the discontinued company, whose lines also extended to the residence and which was apparently in a position to render reasonably adequate service. Since the Commission had jurisdiction to compel such service and would do so upon a showing of its failure, public convenience and necessity was not found to require the extension of new service sought.

In Lake v. Milwaukee, U-3463, U-3468, Oct. 17, 1927, the petitions of the two complaining towns for extension of service by the municipal water utility were dismissed when it appeared that the towns after a reasonable notice had failed to take any action with regard to the advisability of prosecuting the petitions owing to the fact that a section of the territory might become a part of the city and further, that the towns had not decided whether they would want to levy a direct tax for the purpose of putting in water mains. The Wisconsin Commission further stated: "In view of the fact that inquiries by the Commission fail to show any action has been taken by the town of Milwaukee or Lake relative to the questions noted above and further that no municipal water utility has been established in these communities or permits granted for privately owned main piping systems through which water might be retailed, it is believed the petitions should be dismissed."

b. Abandonment or discontinuance of service.

1. Railroad station agency service.

In Re Illinois C. R. Co. No. 16515; Re Illinois C. R. Co. No. 16516; Re Illinois C. R. Co. Nos. 16517, 16518, Oct. 5, 1927, the Illinois Commission refused to allow a petition of the Illinois Central Railroad to discontinue various agency stations along its routes and substitute therefor prepay stations. The company did not contend that the stations were not profitable but that, owing to the very small amount of business and the close proximity of the station, agency service was unnecessary and prepay stations in lieu thereof would be sufficient. The Commission found that the revenues derived were adequate to warrant maintenance of the agency service, and that the proposed change would greatly inconvenience shippers.

The Illinois Commerce Commission, in Re Illinois C. R. Co. No. 17128, Nov. 16, 1927, approved an application of the petitioner to discontinue a ticket agency at a small unincorporated village of about thirty-five people, upon a showing that except for the construction of two hard surfaced roads in the vicinity, the milk shipments, which had been the principal object of revenue to the carrier, had almost entirely ceased and were being carried by auto trucks, and further that freight shipments were almost entirely inbound and were handled at an adjacent station, and that the passenger business had largely decreased, resulting in a disproportionate and in-

adequate return for the maintenance of the station. A new station was ordered to be built to replace an old one destroyed by fire, and caretaker service to be substituted.

The Indiana Commission has approved the petition of a railroad carrier for authority to discontinue services of a station agent and to make the same a prepaid station where evidence showed that under the old plan the agent was only available for about four hours throughout the day and under the proposed plan the agent at a nearby station less than a mile distant would be available at all times. Over and above the fact that the revenues obtained from the old station did not seem to warrant continuance of the same, the Commission believed that the plan proposed in the new set up would furnish better service and that the citizens of the community would profit thereby. Re Pennsylvania R. Co. No. 9060, Nov. 4, 1927.

In Selectmen of Lyndeborough v. Boston & M. R. Co. D–1036, Dec. 1, 1926, the railroad was not permitted to substitute a caretaker for an agent, placing a station on a prepayment basis, where the estimated saving to the carrier of $900 a year was overbalanced by the loss and inconvenience to the patrons of the state resulting from the change. The New Hampshire Commission said: "A few years ago the railroad had practically no credit, today its credit is good. The Boston & Maine Railroad is affected only in a minor way in its operations by maintaining this agency, and we are of the opinion that the saving which the railroad may make by the intended discontinuance is overbalanced by the loss and inconvenience which will be suffered by the community around and about the South Lyndeboro station."

In Re Denver & R. G. W. R. Co. Case No. 986, Oct. 28, 1927, the Utah Commission refused an application of a railroad to discontinue agency service at a station where the monthly revenues for a period of unusual shipping depression, due to crop failure, totaled $520 as against $135 for maintenance, and where it further appeared that future business would be much greater, and that the station was not served by any other road, and that the shipments were of a nature that required the attention and care of an agent. It was argued that the system of the applicant as a whole was not earning a fair return as a whole and that the carrier was entitled to the saving from the proposed substitution in view of the small profit derived from the station. The Commission pointed out that since no showing had been made that the branch line, upon which the station was located, was not profitably operated, it must be presumed to pay. The Commission stated further: "It has been conclusively shown in this case that the town of Goshen, where the agency is sought to be discontinued, is greatly in need of agency service and that the same could not be dispensed with, without great inconvenience not only to the town but to the surrounding territory

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which contributes heavily to the traffic of the applicant's branch line."

2. Inadequate return.

The Illinois Commerce Commission approved the petition in Re Illinois C. R. Co. No. 17339, Nov. 16, 1927 for leave to discontinue the operation of certain trains between mining towns upon a showing that the trains were being operated at a great loss, that an average of only three persons a day were carried on such trains, that passenger patronage had been deflected to other transportation systems furnishing a far more direct route, that no mail was carried, and that public convenience and necessity as a whole did not require the continuance of such service.

3. Improper action of patrons.

The Colorado Commission, in Re Colorado Motor Way, Application No. 953, Decision No. 1490, Nov. 7, 1927, refused the application of a motor carrier for authority to discontinue its route, but intimated that after a reasonable time it would entertain a new application to the same end. The evidence showed beyond a doubt that the route was an unprofitable one but also that the carrier had not done all that it reasonably could to acquaint the shipping and travelling public with the service being rendered over that particular route. On the other hand, evidence also showed that the business men in the protesting town along the route had not done all that they reasonably could to make the operation a profitable one. The Commission said: "If the operation is finally to be ordered continued for the benefit of the people along the route, it is their duty to show that they have exerted all reasonable efforts to assist the motor vehicle carrier in making the operation a profitable one. We believe it is incumbent upon them, particularly the business man, to require as much merchandise as possible to be shipped to them over the applicant's line, if the rates and service are reasonable."

The Illinois Commission, in Re Cleveland, C. C. & St. L. R. Co. No. 15742, Nov. 10, 1927, has approved the petition of a railroad to discontinue service because of the failure of an industry to pay the cost accrued for reconstruction and maintenance of a certain side track which had been built by the petitioner under a contract with an industry formerly occupying the plant site which had changed hands several times since. The Commission found that the repairs were for the benefit of the respondent and that the petitioner was a common carrier with a positive duty under law to render service equally to all industries along its lines without discrimination and that the maintenance of said track for the benefit of the respondent without contribution and without the execution of the standard form of side-track agreement required of other industries, was an unlawful preference.

P.U.R.1928A.

II. Meters.

Where it was shown that a municipal water utility was operating upon a very small margin of profit and sometimes at a loss, due to discriminatory features occasioned by the evasion of a service charge through the use of one meter by two or more families, the Indiana Commission amended a rule of the utility to read as follows: "Each patron or owner of a double apartment or house or business block wishing water service through one meter shall be required to install larger meters than single apartments or business blocks, size of meters to be determined by the number of tenant users or apartments or divisions of business rooms and tenants within said houses or blocks." Re Municipal Water Plant, No. 9062, Oct. 7, 1927.

III. Service by automobile.

In granting a certificate of convenience and necessity to operate as a motor carrier, the Missouri Commission, in Re Missouri Transit Co. Case No. 5330, Nov. 9, 1927, makes the following comments on time schedules. "We find no objection to the time schedule and rates of fare as shown in applicant's petition, excepting that the time schedule shows only the times of departure from Columbia and Boonville. It should also show the times of departure from intermediate points where regular stops are made. The tariff schedule fixes charges from and to Midway and Rocheport, hence we presume that regular stops are made at these two intermediate points at least. Both the time schedule and the proposed tariff schedule should be filed with the Commission."

The Board of Railroad Commissioners of Montana, in granting a certificate of convenience and necessity to operate a motor freight service between two cities for the accommodation of merchants and wholesalers, suggested that the inefficiency incident to the pick-up and delivery system might result in a burden in the form of high tariffs. The Commission stated that the proposed rates were not high in comparison with other forms of service; the undertaking, being entirely new and untried, left them no standards by which to gauge the reasonableness of the tariff. The Commission was of the opinion, however, that the applicant should make a further classification of the service and that they would render between the two points by establishing a terminal-to-terminal freight service. The Commission pointed out that such service obviously could be rendered at a lesser scale than pick-up-and-delivery service and would accommodate the needs of a large number of residents in the vicinity who desired only that type of service, and that it was a matter of small moment to select convenient central spots along the routes. Re Howe & Holt Transfer Co. Docket No. 994–A, Report & Order No. 1499, Nov. 18, 1927.

NEBRASKA STATE RAILWAY COMMISSION.

RE LINCOLN TRACTION COMPANY.

[Application No. 6964.]

Service — Automobiles as substitute for street cars — Transportation of travelers to depot.

1. The substitution of busses for street cars to serve the traveling public on a route going to a depot was considered inadequate because the entrances to the busses and the narrow aisles and seats were such that people with baggage could not be accommodated, p. 862.

Service — Discontinuance of street car service — Maneuvering of route to substitute service.

2. An offer of a street railway company, on petitioning for discontinuance of part of its transit system, to make a turn at a former junction of a single track system and back down two blocks on a section of track on the route sought to be discontinued in order to furnish service to a depot was, in the opinion of the Commission, a most impractical and unreasonable movement, p. 863.

Service — Rearrangement of track layout to substitute necessary service — Discontinuance — Railways.

3. A street railway company seeking to discontinue certain sections of its traction system was ordered to construct certain new track connections in an effort to unite certain branches of its system into one complete route serving the distant railroad depots as well as the central section of the city, p. 863.

Service — Discontinuance of street car route — Necessary service — Depots.

4. The traveling public cannot be denied the service of street cars at a point as convenient to take advantage of as the service offered by taxicabs where the leading depot of a metropolitan city justifies street car service to its doors, p. 864.

Service — Discontinuance of street cars — Reasons — Repaving of street.

5. Authority to abandon tracks of a street railway company along highways to be resurfaced or repaved was granted so that the car company would not be required to contribute towards the expense, where the revenue had fallen off to such an extent that there were no funds to pay for the improvement, p. 864.

[November 3, 1927.]

APPLICATION of street railway company to abandon certain portions of track; granted.

Appearances: George A. Lee, Attorney, Mr. E. R. Heiny, General Manager, for the applicant; Mr. Charles R. Wilke, City Attorney, Mr. D. L. Erickson, Engineer, Mr. W. S. Whitten, Chamber of Commerce, for the city.

Randall, Chairman: The Lincoln Traction Company made

application to abandon their tracks and street railway service on Q street between 9th and 7th streets and on 7th street, Q to P street and on P street from 7th to 9th, giving as a reason that 7th street was to be repaved at the present time and in the near future Q street and possibly P street, would have to be repaved or resurfaced and the company does not have any funds with which to pave or resurface these streets and relay their tracks and ask permission from the Railway Commission to abandon street car service west of the corner of 9th and P streets. Hearing was held in the office of the Commission at 10:00 o'clock A. M., October 11, 1927.

It was shown by the testimony of General Manager Heiny, that the gross revenue and the number of passengers carried from 1920 to and including eight months of 1927, had been falling off to such an extent that the income of the company had been depleted so that they had no funds with which to pave between the tracks, as is required by the city of Lincoln, in case of repaving or resurfacing. [Exhibits showing revenues and expenses omitted.]

The city of Lincoln was represented by their attorney, Mr. Charles R. Wilke and the chamber of commerce by Mr. Walter S. Whitten. Neither the city nor the chamber of commerce had any objection to the abandonment of street car service from 9th on Q to 7th and from Q to P on 7th, but there was objection raised to the abandonment of service from 7th to 9th on P.

The traction company made a proposition to run their shuttle car around on 9th in front of the Lincoln Hotel and then make a turn, backing the car down to the foot of P street on 7th, in order to handle the service to the Burlington and Union Pacific stations.

[1] A proposition was made by the city for the company to furnish bus service from 9th down to the station, but the Commission did not look with favor upon this class of service as it would be inadequate to serve the traveling public as the entrance to the busses and the aisles and seats are such that people with baggage could not be accommodated, either in leaving or entering the busses. Owing to the narrow seats and narrow aisles, grips or satchels could not be carried by the passengers.

At the present time, the car known as the 28th and Sumner

car, is making the loop from 9th and P to 9th and Q; 9th and Q to 7th and Q; 7th and Q to 7th and P, carrying passengers to and from the Burlington and Union Pacific depot. This with the shuttle service seems to be adequate service, but the shuttle service alone would not be adequate.

The traction company is at the present operating a double end car to Wyuka and returning around the Government Square loop. If the company was required to run this car down P street to the Burlington and Union Pacific depot, this would give passengers who arrived on the Rock Island railroad an opportunity to take the car from the Rock Island depot to the Chicago, Burlington & Quincy and Union Pacific depot and at the same time, furnish service to all passengers desiring to go to the Chicago, Burlington & Quincy and Union Pacific depot, from the business part of town.

[2, 3] If the traction company would install a short stretch of track on 9th street on P, to connect the track at 9th and P, so that cars could run straight down P street, the shuttle car and the Wyuka car would be able to handle the business to and from the Chicago, Burlington & Quincy and Union Pacific depot, so that there would be adequate service for the traveling public, both in arriving and departing by the trains on the Chicago, Burlington & Quincy and Union Pacific. At the same time service would be rendered to the traveling public to the principle hotels and business houses in the city. There would be very little expense to the company in arranging these tracks at the corner of 9th and P to make a straight connection down P street, without turning around on the 9th street track and then backing down to the depot, which in the opinion of the Commission would be a very impractical and unreasonable movement.

It will be necessary for the company to furnish more service to the depot than the shuttle car would afford and if the 28th and Sumner car discontinued running to the depot, it would be necessary for them to furnish other service and as the car running to Wyuka is a double end car and could be used on this line without any expense in transforming, the Commission is of the opinion the company should be required to furnish this service, in lieu of the discontinuing of the 28th and Sumner car to the depot.

[4] Lincoln is a capital city of over 70,000 and is rapidly increasing in population. The Chicago, Burlington & Quincy Railroad Company has recently erected a magnificent depot and the Commission can not permit a condition that would deny the traveling public of street car service at a point that is as convenient for them to take advantage of as is being offered by the taxi service. In case street cars were not required to run down to the depot, the result would be to drive the traffic to the taxicabs, the public would be required to pay an extra amount for service and the street car company would lose a large revenue which they would receive if their cars were at a convenient point for the traveling public to patronize when entering or departing from the city over the Chicago, Burlington & Quincy and the Union Pacific Railroad.

[5] The Commission realizes the condition that is confronting the traction company. The added expense of paving on 7th street and with the prospect in the near future of being required to either repave or resurface Q street, which would necessitate the taking up of the tracks and relaying of them, would make an expense that the company would be required to furnish funds from some other source than from revenue of the company, to pay for it.

It seems unreasonable for the Commission to require a company to go down in their pockets for money to make unnecessary improvements, when the revenue of the company is falling off to such an extent that there is no funds to pay for these improvements, or to pay dividends.

The Commission is of the opinion and so finds that the application of the Lincoln Traction Company to abandon their tracks and discontinue running cars from 9th and Q to 7th; from Q on 7th to P, should be granted, but that the traction company shall be required to build a stretch of track connecting the tracks on P street at the intersection on 9th and P streets, so that cars may be routed straight down P street to 7th street on a line with the curb at the west line of the sidewalk on the north side of P street. Also, that the company should be required to run the car known as the Wyuka car, and the shuttle car, down P street to the terminus above mentioned.

INDEX.

ABANDONMENT.

Abandonment and discontinuance of service, see SERVICE, 11–21.

ACCOUNTING.

Payment of percentage of revenues to parent company in lieu of salaries of general officers, see RETURN, 7.

Book value as not providing a fair rate base when appraisal value has been injected into the entries, see VALUATION, 8.

1. The difference between the fair value of property of a small utility absorbed by a larger one and an amount exceeding the same but authorized by the Commission in order to accomplish the purchase was not permitted to be charged to the property accounts or capitalization of the purchasing company but required to be amortized through dividends and surplus. Re Illinois Power & Light Corp. (Ill.) 776.

2. A company operating a grain elevator and an electric plant should keep a system of accounts whereby the expenses of the electric utility will be shown as distinguished from the operations of the company as a whole. Re Farmers Elevator Co. (N. D.) 469.

ACCRUED DEPRECIATION.

Reduction of depreciation allowance in view of excessive reserve for accrued depreciation, see DEPRECIATION, 3.

ACTIVE-ROOM SCHEDULE.

Authorization of experimental active-room rate schedule, see RATES, 37, 38.

AGRICULTURAL PRODUCTS.

Consideration of hauling farm products in conjunction with hauling of other articles as evidence of public necessity notwithstanding statute exempting from regulation of motor vehicles operated exclusively in transporting agricultural products, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 42.

AIR HEATING.

Electric rates for air heating, see RATES, 21, 22.

AMENDMENT.

Of Commission order erroneously dated to conform to facts, see APPEAL AND REVIEW, 31.

APPEAL AND REVIEW.

I. In general, 1–3.
II. Scope of review, 4–23.
a. Questions open upon appeal, 4–12.
b. Presumption and conclusiveness of findings, 13–23.
III. Grounds for reversal or modification, 24–26.
IV. Procedure, 27–31.

I. In general.

Temporary Commission order to test accuracy and reasonableness of proposed telephone rates as subject to review by court, see RATES, 39.
Commission orders pending review, see RATES, 40–42.

Annotation on orders or judgments appealable, p. 139.

1. A utility will not be penalized for reliance upon a former decision of the Commission, subsequently overruled, as far as intervening operations are concerned. Re Giacomelli Brothers (Colo.) 425.

2. A reversal of a Commission's finding of fact, raised on appeal under a constitutional provision (Const. Amend. Art. 12, § 1) giving the state supreme court power "to sustain or reverse the order appealed from," must be in the form of an order for a Commission rehearing. Public Utilities Commission v. East Providence Water Co. (R. I. Sup. Ct.) 141.

3. Whether a municipal ordinance is void under the law of the state involves questions upon which the Supreme Court of the United States should not be called upon to pass without the aid which discussion by members of the lower courts familiar with the local law should afford. Hammond v. Schappi Bus Line (U. S. Sup. Ct.) 388.

II. Scope of review.

a. Questions open upon appeal.

Annotation on questions open upon appeal, p. 139.

4. Questions of fact raised on appeal from an order of the Commission are not reviewable under a state constitutional provision (Const. Amend. Art. 12, § 1) giving the state supreme court "final revisory and appellate jurisdiction upon all questions of law and equity." Public Utilities Commission v. East Providence Water Co. (R. I. Sup. Ct.) 141.

5. An order requiring the construction of a new station based on a petition that present passenger station is inadequate for either passenger or freight service, necessarily involves both kinds of service and provisions incident to either are not beyond the scope of the petition. Norfolk & W. R. Co. v. Com. ex rel. State Corp. Commission (Va. Ct. App.) 397.

6. An order changing the layout of track is incident to the improvement of station facilities granted under a petition complaining that the present station is inadequate for either passenger or freight service, and is, therefore, not beyond the issues made in pleadings of the petition. Norfolk & W. R. Co. v. Com. ex rel. State Corp. Commission (Va. Ct. App.) 397.

7. Unchallenged findings being found sufficient to support the judgment of the Commission, the exceptions to its other findings were not

APPEAL AND REVIEW—*continued.*
deemed necessary to be considered. Royalton v. Central Vermont R. Co. (Vt. Sup. Ct.) 633.

8. Exceptions to the failure of the Commission to make certain findings will be overruled on appeal where the record fails to show any requests for such findings. Royalton v. Central Vermont R. Co. (Vt. Sup. Ct.) 633.

9. The question whether the Interstate Commerce Commission has erroneously decided that two railroads under common control and management are not operated as a single system for the purpose of computing excess return is judicially examinable by a court in which an injunction is sought against a Commission order providing for recapture of earnings. St. Louis & O'Fallon R. Co. v. United States (U. S. Dist. Ct.) 740.

10. The issues of fact or law vital to the determination of an appealed cause should be settled by a lower court, upon the evidence introduced, before the submission to a higher tribunal. Hammond v. Farina Bus Line & Transp. Co. (U. S. Sup. Ct.) 382.

11. The facts essential to the decision of any question vital to the determination of an appealed cause should be definitely found by lower courts upon adequate evidence before such a question is passed upon by the Supreme Court of the United States. Hammond v. Schappi Bus Line (U. S. Sup. Ct.) 388.

12. An appeal from an interlocutory decree denying a preliminary injunction to restrain the operation of an ordinance is not a submission of a cause for final judicial determination, and a ruling made on the basis of evidence presented at such a hearing can be rendered of no avail by the presentation of additional evidence when the case comes up upon final hearing. Hammond v. Schappi Bus Line (U. S. Sup. Ct.) 388.

b. Presumption and conclusiveness of findings.

Annotation on conclusiveness of Commission's findings, p. 139.

13. Although an application to a state supreme court to stay the operation of an order of the Railroad and Warehouse Commission relative to restricting the carriage of passengers by a motor operator except on mail trips, after a similar application has been denied by the district court, is not in the nature of an appeal, yet the high court, if disposed, may give weight to conclusions reached by that court and concur therein, unless the facts presented make it reasonably certain that unjustifiable prejudice or injury will result from a denial of the application. State v. Lefebvre (Minn. Sup. Ct.) 14.

14. The burden of proof is placed by statute (§ 10535, R. S. 1919) upon the party adverse to the Commission, in a suit to review an order of the latter, to show by convincing evidence that the order complained of is unreasonable or unlawful. State ex rel. Missouri P. R. Co. v. Public Service Commission (Mo. Sup. Ct.) 615.

15. A Commission order for the extension of a railroad siding will not be disturbed by the court on certiorari because of a claim that the extension is not workable on account of the grades, where there is evidence reasonably supporting the Commission finding that the extension is workable. Rahway Valley R. Co. v. Public Utility Comrs. (N. J. Sup. Ct.) 135.

16. On appeal from an order of the Corporation Commission issuing a

APPEAL AND REVIEW—*continued.*
certificate of public convenience and necessity to operate a motor bus over the public highways, if there is any evidence reasonably tending to support the order of the Commission, the prima facie presumption of the order's being reasonable, just, and correct obtain by reason of § 22, article 9, of the Constitution, and the burden is upon appellant to overcome that presumption. Chicago, R. I. & P. R. Co. v. State (Okla. Sup. Ct.) 255.

17. If there is any evidence to support the order of the Corporation Commission fixing a rate, the prima facie presumption of fairness and reasonableness will obtain, pursuant to Const. art. 9, § 22. Kansas, O. & Gulf R. Co. v. State (Okla. Sup. Ct.) 825.

18. Under § 22, art. 9 of the Constitution, all orders made by the Corporation Commission are presumed to be reasonable until the contrary is made to appear. This presumption, in favor of the reasonableness of orders made by the Corporation Commission was created by the Constitution of the state for a definite purpose and cannot be disregarded by the court, unless the contrary is made to appear. Kansas, O. & Gulf R. Co. v. State (Okla. Sup. Ct.) 825.

19. The assumption is that the Commission made proper use of the evidence before it for all legitimate purposes, and a mere statement by the Commission claimed to be immaterial to the issues in the case, does not warrant an inference to the contrary. Royalton v. Central Vermont R. Co. (Vt. Sup. Ct.) 633.

20. A Commission ruling on appeal will be sustained, if possible, on legal grounds which were not urged in inferior proceedings, contrary to the rule if a reversal were sought under the same circumstances. Royalton v. Central Vermont R. Co. (Vt. Sup. Ct.) 633.

21. Although the courts have jurisdiction under the State Constitution (clause (f) § 156) to determine the reasonableness and justice of the action of the State Corporation Commission, there is a prima facie presumption that the orders of that body are just, reasonable, and correct that must on review of the same be positively rebutted. Norfolk & W. R. Co. v. Com. ex rel. State Corp. Commission (Va. Ct. App.) 397.

22. A return of the Department of Public Works to the supreme court of Washington for review may include petitions, resolutions, letters, and anything else received by the Department in aid of the case, in view of the informal nature of such proceedings, the court always assuming that the Department admitted no improper testimony unless the contrary plainly appears on the face of the record. State ex rel. Byram v. Department of Public Works (Wash. Sup. Ct.) 421.

23. The findings and conclusions of the Commission as to facts are vested with the presumption of truth and accuracy, and without clear and substantial evidence of palpable error will be undisturbed and its judgment within its proper jurisdiction respected. State ex rel. Byram v. Department of Public Works (Wash. Sup. Ct.) 421.

III. Grounds for reversal or modification.

24. Overruling a demurrer to a plea of the statute of frauds improperly interposed as a defense to a suit for damages resulting from a fire caused by defective wiring is a prejudicial error where it results in keeping out of

APPEAL AND REVIEW—*continued.*
evidence an installation contract necessary as an inducement to show the relationship of the parties creating the duty alleged to have been breached. Compton v. Alabama Power Co. (Ala. Sup. Ct.) 724.

25. An exception to the ruling of the trial court, admitting into evidence rules of the Commission regulating electric service, some of which were unauthorized and the balance of which were irrelevant, was well taken and the ruling reversed on appeal from a suit against an electric utility for damages from fire resulting from defective wiring. Compton v. Alabama Power Co. (Ala. Sup. Ct.) 724.

26. The lower court should set aside, without remanding for further proceedings, an order, decision, and award by the motor transportation commissioner of a certificate of convenience and necessity granted to a bus operator over a route already served, under the erroneous impression that it was his duty to grant the same on a finding of "public convenience" requiring such service regardless of the "necessity" therefor. Cooper v. McWilliams & Robinson (Ky. Ct. App.) 731.

IV. Procedure.

Order for Commission rehearing on reversal of Commission's finding of fact raised on appeal under constitutional provision, see supra, 2.

Annotation on parties on appeal, p. 140.

27. In proceedings to review an order of the Public Service Commission, an objection to the constitutionality of an amendment (§ 10459, p. 322, Laws 1925) upon which the order is based is waived if not raised at the earliest possible stage of the proceedings. State ex rel. Missouri P. R. Co. v. Public Service Commission (Mo. Sup. Ct.) 615.

28. The burden of proof is upon the Commission to establish the materiality of the testimony sought to be elicited by interrogatories during its investigation. Gilchrist v. Dahl (N. Y. Sup. Ct. Sp. T.) 336.

29. The supreme court of Rhode Island after hearing upon appeal from a Commission rate order should enter its final decree as the final determination of the matter instead of directing the Commission to enter a final order or decree upon its record with intent to make the final determination that of the Commission. Public Utilities Commission v. East Providence Water Co. (R. I. Sup. Ct.) 144.

30. A motion for appeal seasonably filed from a corrected date of a Commission order will be considered regularly presented to the court where the record of the case discloses no evidence contrary to the action of the Commission in reforming the date of the order. Royalton v. Central Vermont R. Co. (Vt. Sup. Ct.) 633.

31. The Commission may amend an order erroneously dated to conform to facts where an appeal from the same has been thereby dismissed by the supreme court because of a failure to file within twenty days and which in fact has been seasonably filed. Royalton v. Central Vermont R. Co. (Vt. Sup. Ct.) 633.

APPLICANTS.

Power of Commission to prefer applicant for certificate, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 16.

APPLICANTS—*continued.*

Choice of applicants for certificates, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 43–46.

Dismissal of application for certificate when none of original applicants appear, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 55.

Requirement that each applicant for certificate authorizing motor truck service state definitely the route or territory, and character of service contemplated, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 56.

Denial of right of various individuals to operate motor trucks separately and without any sort of financial connection, under one permit or certificate, and upon payment of but one statutory fee, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 57.

APPORTIONMENT.

Duty of grain elevator and electric company to keep proper accounts distinguishing operations, see ACCOUNTING, 2.

Division of cost of viaduct, see CROSSINGS, 5.

1. The matter of apportioning revenues is very largely arbitrary and there is no reason to assume that figures, first introduced by a utility witness, were not just as accurate as those subsequently adduced without apparent cause for the change. Daly v. Chicago, B. & Q. R. Co. (Ill.) 661.

APPRAISALS.

Book value as not providing a fair rate base when appraisal value has been injected into the entries, see VALUATION, 8.

ASSIGNMENT.

Of certificate of convenience and necessity, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 54.

AUTOMOBILES.

Certificates for operation, see CERTIFICATES OF CONVENIENCE AND NECESSITY.

Lack of jurisdiction of Commission over motor busses prior to Motor Bus Law, see COMMISSIONS, 3.

Application of traction utility to increase fares on bus routes forming part of municipal transportation system as not within Commission jurisdiction, see COMMISSIONS, 4.

Lack of Commission jurisdiction over levying or collecting of license tax by motor bus operator, see COMMISSIONS, 5.

Commission jurisdiction over motor carriers as not extending to carriers operating over irregular routes, nor between fixed termini, see COMMISSIONS, 6.

Lack of Commission jurisdiction to pass upon validity of ordinance limiting load of motor vehicles, see COMMISSIONS, 13.

Commission power to determine validity of ordinance prohibiting automobiles from stopping to receive or discharge passengers on streets where there are street cars, see COMMISSIONS, 14.

AUTOMOBILES—*continued.*

Necessity of evidence to show that selling party still has in fact possession of stock and is in position to carry out terms of original contract to warrant reconsideration by Commission of former ruling refusing permission to traction utility to purchase capital stock of bus utility, see CONSOLIDATION, MERGER, AND SALE, 1.

Provision for use of highway by motor carriers for hire as valid constitutional exercise of police power, see CONSTITUTIONAL LAW, 5.

Denial of injunction restraining pending appeal, the operation of motor carrier under certificate, see INJUNCTION, 1.

Competition by transportation companies, see MONOPOLY AND COMPETITION, 11–27.

Rate cutting by motor bus operators, see MONOPOLY AND COMPETITION, 28, 29.

Restrictions on authorizing competitive motor bus service, see MONOPOLY AND COMPETITION, 30–34.

Company delivering packages for department stores under contract as not engaged in business of common carrier, see PUBLIC UTILITIES, 6.

Auto carriers as public utilities, see PUBLIC UTILITIES, 7–10, 13–16.

Meaning of phrase "public convenience and necessity," see SERVICE, 2.

Authorization of abandonment of motor bus operation in view of inadequate return, see SERVICE, 12.

Substitution of motor bus service for railway service, see SERVICE, 22–25.

1. Regardless of whether or not it is the announced policy of a motor transportation utility to confine its operations to boulevards and not to engage in city wide transportation, the Commission reserves the right to order such transportation as public convenience requires whether on boulevards or central districts and will reroute such utilities at its discretion. Re Chicago Motor Coach Co. (Ill.) 564.

2. A motor carrier operating over an irregular route cannot be required to file liability insurance under a law (§ 7, Motor Bus Regulation Act, 1927) providing that such insurance should be filed as a condition precedent to the issuance of a certificate where a certificate is unnecessary for such operation. Re Worrell (Mo.) 793.

AUXILIARY VESSELS.

Necessity of certificate before operation of boats, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 17–19.

BASEBALL CLUB.

Carriage of members of baseball club over its circuit by motor bus under contract as illegal without certificate, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 24.

BASIS.

Of return, see RETURN, 1, 2.

BOATS.

Necessity of certificate before operation of boats, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 17–19.

BONDS.

Generally, see SECURITY ISSUES.

Issue of new bonds to take up outstanding valid obligations in excess of two-thirds of value of paid up capital stock, notwithstanding prohibition against issuance of such proportions where indebtedness was created by original bonds issued under similar restrictions, see CONSTITUTIONAL LAW, 16.

BOOK VALUE.

Book value as not providing a fair rate base when appraisal value has been injected into the entries, see VALUATION, 8.

BRAWLS.

Right of street railway company to discharge motorman for engaging in brawl, see LABOR, 2.

BRIDGES.

Construction of bridge by state to compete with toll bridge company operating under state franchise as not confiscatory, see CONSTITUTIONAL LAW, 12.

Bridges at crossings, see CROSSINGS.

Competition by bridge companies, see MONOPOLY AND COMPETITION, 5, 6.

State regulation of toll rates as not giving utility exclusive right to maintain its bridges, see RATES, 2.

BRITISH THERMAL UNITS.

Gas rates as affected by B.T.U. in gas supplied, see RATES, 23.

Gas utility standards, see SERVICE, 27.

BURDEN OF PROOF.

Burden of proof on appeal from Commission order, see APPEAL AND REVIEW, 14.

Burden of proof to overcome presumption of reasonableness of Commission finding, see APPEAL AND REVIEW, 16.

Burden of proof upon Commission to establish materiality of testimony sought to be elicited by interrogatories during investigation, see APPEAL AND REVIEW, 28.

Burden of proof cast upon utility seeking increased rates to prove true valuation, see VALUATION, 1.

BUSINESS.

Disapproval of rates which would result in loss of essential patronage, see RATES, 11.

Business development from free interexchange telephone service, see RATES, 32.

BUSINESS SERVICE.

Unexplained free service to business phones as unlawful, see DISCRIMINATION, 8.

CALIFORNIA.

Necessity of certificate before operation of boats, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 17–19.

CANCELLATION.

Of certificates of convenience and necessity, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 51–53.

CAPITALIZATION.

See also SECURITY ISSUES.

Amortization of excessive purchase price, see ACCOUNTING, 1.

Capitalization as not the proper basis for rates, see RETURN, 2.

Allowance of return based on value of security issues, see RETURN, 19.

Allowance of increased rates on valuation measured by outstanding securities, see VALUATION, 9.

CARRIERS.

Commission jurisdiction in determining status of railroad as a common carrier, see COMMISSIONS, 10.

CARS.

Damage to paving by street car operation, see STREET RAILWAYS, 1–3.

CERTIFICATES OF CONVENIENCE AND NECESSITY.

I. In general, 1–4.
II. Jurisdiction, powers, and duties of Commissions, 5–16.
III. Necessity for securing, 17–26.
IV. Powers of municipalities, 27–29.
V. Operation in good faith prior to regulation, 30, 31.
VI. Grounds for granting or refusing, 32–34.
VII. Evidence of necessity, 35–42.
VIII. Choice of applicants, 43–46.
IX. Limitations and conditions, 47–50.
X. Revocation and cancellation, 51–53.
XI. Assignment or transfer, 54.
XII. Procedure, 55–57.

I. In general.

Provision for use of highway by motor carriers for hire as valid constitutional exercise of police power, see CONSTITUTIONAL LAW, 5.

Denial of injunction restraining pending appeal, the operation of motor carrier under certificate, see INJUNCTION, 1.

Meaning of phrase "public convenience and necessity," see SERVICE, 2.

CERTIFICATES OF CONVENIENCE AND NECESSITY—*continued.*

Annotation on consent of governmental bodies other than Commissions, p. 106.

Annotation on scope of certificates, p. 110.

Annotation on extension of term of certificates, p. 656.

1. Evidence examined, and held, appellant's evidence insufficient to overcome the prima facie presumption of the reasonableness, justness, and correctness of the order appealed from. Chicago, R. I. & P. R. Co. v. State (Okla. Sup. Ct.) 255.

2. Where the existence of public convenience and necessity is a prerequisite to the authorization of a motor carrier to furnish services, as required by § 4, chapter 113, Session Laws of Oklahoma, 1923, the word "necessity" means a public need, without which the public is inconvenienced to the extent of being handicapped in the pursuit of business or wholesome pleasure, or both—without which the people generally of the community are denied, to their detriment, that which is enjoyed by other people generally, similarly situated. Chicago, R. I. & P. R. Co. v. State (Okla. Sup. Ct.) 255.

3. Testimony relative to the adequacy or inadequacy of motor carrier service rendered by the holder of a certificate of convenience and necessity is irrelevant in a proceeding in which operation without a certificate is complained against, as any inadequacy of existing service cannot confer upon another operator the right to operate without approval of the Commission. Harlacker v. Adams Transit Co. (Pa.) 12.

4. The application for a spur track extending from the end of an existing main line is not an evasion of the statutes requiring a certificate of convenience as a condition precedent to the construction of an extension of main line. Stange Lumber Co. v. Chicago, M. & St. P. R. Co. (Wis.) 721.

II. Jurisdiction, powers, and duties of Commissions.

Lack of Commission jurisdiction over motor vehicles operated wholly within limits of a city, or where major part of system is within such limits, see supra, 11.

Reservation of Commission right to order transportation whether on boulevards or central districts regardless of whether or not it is the announced policy of motor transportation utility to confine its operation to boulevards, see AUTOMOBILES, 1.

Commission jurisdiction over motor carriers as not extending to carriers operating over irregular routes, not between fixed termini, see COMMISSIONS, 6.

5. The Commission has no jurisdiction to restrain motor carrier service without a certificate when such service is rendered by a private carrier. Anderson v. United Parcel Service (Cal.) 265.

6. While a State Commission has no right to deny a certificate of public convenience to a carrier engaged exclusively in interstate commerce, in the event such carrier is willing to comply with all other provisions of the state law governing motor vehicles it has jurisdiction to grant such a certificate without a showing of public convenience and necessity. Re Paradox Land & Transport Co. (Colo.) 648.

7. Although for rate making certain geographical segregations as a test P.U.R.1928A.

CERTIFICATES OF CONVENIENCE AND NECESSITY—*continued.*
or measure concerning a transportation utility may have been observed, the Commission is not restricted by the terms of applications or certificates of convenience to relegate operations of a utility to certain sections of a city, but may reroute any transportation utility to operate in any section of the city as an undivided whole, according to its opinions of the demands of public convenience. Re Chicago Motor Coach Co. (Ill.) 564.

8. The commissioner of motor vehicles must find that there exists both public "necessity" and public "convenience" to authorize the granting of a certificate to operate over a line where bus service has already been legally established. Cooper v. McWilliams & Robinson (Ky. Ct. App.) 731.

9. The refusal of a city, town, or village along a route to grant a motor bus operator the right to use its streets does not deprive the Public Service Commission of the right to grant a certificate of convenience and necessity. Re Purple Swan Safety Coach Lines (Mo.) 193.

10. The necessity for operation of a motor carrier whose route is largely between different municipalities of a state is strictly a matter for the determination of the Commission and a law of Missouri (1927, § 1, p. 403) giving a city power to supervise rates and service of motor utilities applies only to such systems as operate wholly, or to a major extent, within corporate limits of the same. Re YellowaY (Mo.) 217.

11. The Commission has no jurisdiction over motor vehicles operated wholly within the corporate limits of a city, or where the major part of its operating system is within such limits, under an act (Motor Bus Law 1927, § 1) providing that the authority of the Commission over motor vehicles shall not extend to those used for transportation of passengers for hire operating within any municipal corporation or forming a part of the transportation system thereto. Re Kansas City Pub. Service Co. (Mo.) 582.

12. The authority granted to the Public Service Commission of Missouri with reference to motor bus operations is wholly confined to the transportation of persons and that body has no jurisdiction to authorize an applicant for a certificate to carry express or freight. Re Capitol Stage Lines Co. (Mo.) 677.

13. The Commission is not compelled to wait upon the action of any city before granting a certificate of convenience and necessity to a motor utility, the majority of whose operations are outside of the corporate limits of such city. Re Capitol Stage Lines Co. (Mo.) 677.

14. No formal refusal of a municipality along a proposed bus route is necessary to give the Board of Public Utility Commissioners discretion to act on an application under a law providing that after due application of a proposed transit utility and refusal of consent by any municipality along the route, the Board might then grant a certificate to operate through the same provided no local business was done there. Re Choate (N. J.) 98.

15. The Commission has no power to divide a route solicited in an application for a certificate of convenience and necessity when it appears that only part of the route is publicly necessary, and it will dismiss the application without prejudice to the applicant to renew his petition for that portion of the route which has been proven necessary. Re Tostanoski (N. Y.) 187.

CERTIFICATES OF CONVENIENCE AND NECESSITY—*continued.*

16. The granting of a certificate to one applicant and the refusal of a certificate to another when both are equally prepared to meet all the requirements essential to the rendition of a proposed automobile service is a matter within the discretion of the Commission. Cooper Bus Co. v. Public Utilities Commission (Ohio Sup. Ct.) 738.

III. Necessity for securing.

Power of Missouri Commission as limited to motor transportation of persons and not of property, see supra, 12.

Absence of necessity for filing liability insurance under Missouri Law in the case of motor carrier operating over irregular route, see AUTOMOBILES, 2.

What constitutes a public utility generally, see PUBLIC UTILITIES, 6–16.

Annotation on when certificate is required, pp. 105, 652.

17. A passenger boat of a size under five tons net register is not a "vessel" within the meaning of, and, therefore, not subject to, the Public Utilities Act (§ 2 (y) 1915). Bay and River Boat Owners' Asso. v. Frodsham (Cal.) 173.

18. The operation of a boat to transport various shipments at irregular intervals and under private contract will be permitted without a certificate of convenience and necessity. Bay and River Boat Owners' Asso. v. Frodsham (Cal.) 173.

19. The operation of a boat of a size subject to the Public Utilities Act cannot be permitted, without a certificate, to transport freight and passengers as an auxiliary service to a mail boat not subject to the act. Bay and River Boat Owners' Asso. v. Frodsham (Cal.) 173.

20. A certificate is not required retroactively approving and authorizing construction which took place prior to an act requiring a certificate for the same but applying only to construction made after the act became effective. Re Stanley Power Co. (Colo.) 527.

21. The Commission has no jurisdiction to grant a certificate to a motor carrier operating over an irregular route and not between fixed termini where the act giving to the Commission authority over motor busses (Motor Bus Law 1927, § 2) defines motor carriers as operating between fixed termini and over regular routes. Re Kansas City Pub. Service Co. (Mo.) 582.

22. The difference between a regular and an irregular route is that the former is between fixed termini and the latter is not, but may begin anywhere and extend anywhere within the state. Re Worrell (Mo.) 793.

23. The Commission cannot grant authority to a motor utility to operate over any and all routes within the state regardless of existing facilities where a provision of statutes (Motor Bus Law 1927, §§ 4, 6) specifically provides that a certificate shall not be required for occasional service over irregular routes. Re Worrell (Mo.) 793.

24. The carriage of the members of a baseball club over its circuit by motor bus under contract is illegal without a certificate of public convenience from the Commission even though under the contract the compensation is to be computed upon the basis of the number of miles the bus may travel P.U.R.1928A.

instead of the number of persons carried. Harlacker v. Adams Transit Co. (Pa.) 12.

25. An owner of automobiles referring to his business as that of an auto livery, devoting his entire time to the business and maintaining an office or headquarters, upon the front of which, facing the public sidewalk, he has a sign advertising an auto livery and bearing his telephone number and a hand pointing to the door of the building, also carrying a similar advertisement in the telephone directory, his cars being parked less than 300 feet from a railroad station, and clearly visible to persons passing along the street, was held to be operating a taxi business unlawfully without a certificate when he operated at uniform rates, although claiming to make an individual bargain with each patron who came to his office, it further appearing that if someone came to the office and requested to be carried to a particular place, and others not accompanying the first patron also applied to be taken to the same destination, he would carry all of them up to the capacity of his vehicle. Rinebold v. Webb (Pa.) 604.

26. Commission approval of the incorporation of a motor transportation company in a stated area does not of itself confer the right to begin to operate, but a certificate of public convenience and necessity must be obtained covering each route. Lehigh Traction Co. v. Motor Transp. Co. (Pa.) 804.

IV. Powers of municipalities.

Refusal of local authorities along route to grant motor bus operator right to use streets as not depriving Commission of right to grant certificate, see supra, 9.

Necessity for operation of motor carrier service whose route is largely between different cities as strictly a matter for determination of Commission notwithstanding law giving city power to supervise rates and service, see supra, 10.

Commission as not compelled to wait upon the action of any city before granting a certificate, see supra, 13.

27. A preliminary order after a showing of the necessary proof of convenience and necessity will be issued declaring that a certificate will be granted after the applicant has obtained from the municipality a franchise, permit, ordinance, or other authority where an act, (C. L. of Colorado, 1921, § 2946 (c)), makes the procurement of such authority a condition precedent to the valid issuance of such a certificate. Re Stanley Power Co. (Colo.) 527.

28. The granting or refusing of a certificate of convenience and necessity by the Public Service Commission does not take away any existing right of municipalities to control the use of their streets. Re Purple Swan Safety Coach Lines (Mo.) 193.

29. Whether or not a city will permit a motor carrier to occupy the route selected by the carrier in its application for a certificate within its corporate limits is a matter to be determined by the city. Re Capitol Stage Lines Co. (Mo.) 677.

CERTIFICATES OF CONVENIENCE AND NECESSITY—*continued.*

V. Operation in good faith prior to regulation.

Annotation on operation in good faith prior to regulation, pp. 106, 655.

30. The Commission must indulge the presumption that motor bus service rendered in good faith previous to a Regulation Act (1927) is necessary to public convenience, and, if the applicant is otherwise qualified, must grant it a certificate of convenience in the absence of positive proof rebutting this presumption. Re Purple Swan Safety Coach Lines (Mo.) 193.

31. In the absence of contrary evidence the presumption prevails that an applicant for a certificate of convenience and necessity operating in good faith prior to regulation is rendering service necessary to public convenience (Mo. Laws 1927, § 11, p. 409). Re YellowaY (Mo.) 217.

VI. Grounds for granting or refusing.

Certificates for competitive service, see MONOPOLY AND COMPETITION.

Annotations on reasons for granting or refusing certificates, pp. 106, 654.

Annotation on character of applicant as affecting granting of certificate, p. 107.

Annotation on illegal practices as a ground for denying certificate, p. 108.

32. In determining whether or not public convenience and necessity requires the operation by any applicant, due consideration should be given to the question of whether or not the operation as a whole can be made to pay. Re Lilley (Colo.) 184.

33. Under the law of Illinois a consideration of the inconvenience of certain individual property owners cannot affect the determination by the Commission of whether the necessities and convenience of the general public require the granting of an application of a motor transportation utility for certificates of convenience and necessity to operate along new routes. Re Chicago Motor Coach Co. (Ill.) 564.

34. An application for a certificate of convenience and necessity was refused on the ground, among others, that the applicant had not shown himself to be a citizen of the United States. Re Labelle (R. I.) 474.

VII. Evidence of necessity.

Presumption that motor bus service rendered in good faith prior to regulation act was necessary to public convenience, see supra, 30, 31.

Reversal of award by Commissioner of certificate for bus operation over route already served, under erroneous impression that it was his duty to grant the same on a finding of public convenience regardless of necessity, see APPEAL AND REVIEW, 26.

Annotation on evidence of necessity, pp. 108, 653.

35. The fact that an applicant will eventually operate over a proposed route in interstate commerce does not of itself entitle the Commission to grant a certificate for intrastate business unless public convenience and necessity for the same were proven to the same degree required in the absence of such interstate operation. Re Townsend (Colo.) 175.

CERTIFICATES OF CONVENIENCE AND NECESSITY—*continued.*

36. Testimony of county commissioners as to public convenience and necessity of a proposed transportation route, while not binding upon the Commission, is entitled to considerable weight. Re Townsend (Colo.) 175.

37. The superiority of the mode of transportation under local conditions as well as the fact that private carriers would secure the business solicited if no certificate were issued, were factors considered in an application by a motor carrier. Re Lilley (Colo.) 184.

38. Loss of revenues by existing railroad carriers over territory included in the proposed route of a motor utility is not proof of the lack of demand for service along such routes, and if the requirements of a population newly formed along the state highways appear to be served by the motor utility in a manner impossible to the railroad carriers, a certificate will be granted notwithstanding railroad operating losses. Re Egyptian Transp. System (Ill.) 43.

39. Legitimate development in a short period of a motor bus utility to large proportions, in the face of unusually keen competition, indicates the necessity for such service and that it is meeting the demand for a different mode of transportation. Re Purple Swan Safety Coach Lines (Mo.) 193.

40. Evidence examined, and held, that evidence is sufficient to support the order of the Corporation Commission. Chicago, R. I. & P. R. Co. v. State (Okla. Sup. Ct.) 255.

41. Evidence covering an interstate demand for motor bus service cannot be considered where permission is asked to give intrastate service. Re Columbia Gorge Motor Coach System (Wash.) 119.

42. Despite a statute (Laws 1923, p. 239) exempting from the necessity of a certificate "motor propelled vehicles operated exclusively in transporting agricultural . . . or other farm products," the Commission is not prevented from considering the hauling of these articles in conjunction with the hauling of other articles as evidence of public necessity, and is entitled to consider the needs of the community as a whole in granting a license therefor. State ex rel. Byram v. Department of Public Works (Wash. Sup. Ct.) 421.

VIII. Choice of applicants.

Power of Commission to prefer applicant for certificate, see **supra, 16.**

Annotation on preference between applicants, p. 656.

43. A certificate of public convenience and necessity should be granted to the one of two applicants who possesses a permit or authorization from the Secretary of War to transport passengers for hire in and upon the grounds of a hospital under the jurisdiction of the War Department, rather than to the applicant who does not possess such authority, when the contemplated service which is found to be necessary is to be conducted in and around the hospital grounds and to a designated city. Re Bus Transportation Co. (Colo.) 645.

44. The receivers of an existing trolley service were given preference in the establishment of a bus route over the old traction routes over an objection as to their financial soundness, where it appeared that a refusal of the application might bring about a total abandonment, and that none of

CERTIFICATES OF CONVENIENCE AND NECESSITY—*continued.*
the other applicants, individually or by combination, were prepared to operate over the full extent of the old trolley line. Re Choate (N. J.) 98.

45. All other necessary requirements being equally satisfied, the Commission decided that a certificate of convenience and necessity, as between two applicants for the same route, should be awarded to one who had begun legalized operation four months prior to the other. Re Lewis (S. D.) 246.

46. Proper consideration of the factor of financial responsibility need not mean that where two or more applicants for the same route have shown sufficient responsibility, the surplus degree of financial resource should be controlling. Re Lewis (S. D.) 246.

IX. Limitations and conditions.

Revocation of certificate for failure to observe restrictions of certificate, see infra, 51.

Restrictions on authorizing competitive motor bus service, see MONOPOLY AND COMPETITION, 30–34.

Annotation on restrictions and conditions, p. 656.

47. Authority was granted to operate a motor carrier system for the transportation of passengers in sightseeing and tourist business in the so-called Pikes Peak region for one year, pending the better determination of what the public convenience and necessity required. Re Muscati (Colo.) 764.

48. In order to prevent the receivers of an existing trolley line from acquiring the right to operate busses over the old traction routes for speculative purposes only, a certificate was granted with a condition subsequent of prompt installation of actual service. Re Choate (N. J.) 98.

49. An order of the Commission granting overlapping certificates was not regarded favorably and modified so as to limit the operation of each carrier to specific territory. Cooper Bus Co. v. Public Utilities Commission (Ohio Sup. Ct.) 738.

50. A certificate may be granted authorizing a limited motor truck service rendered to a limited number of business and industrial concerns when the existence of other carrier service makes it inadvisable to authorize the operator to engage in a general or unrestricted carrier business. Re Guerin (Pa.) 709.

X. Revocation and cancellation.

Annotation on revocation of certificates, pp. 112, 657.

51. Public convenience and necessity was held not to require the revocation of a certificate authorizing motor carrier service because of the failure of the holder to observe the restrictions in the certificate relating to property to be transported where the law relating to motor carrier regulation had been unsettled and the unauthorized service was begun on account of competition by unauthorized carriers, it appearing further that upon revocation of the certificate no one but the unauthorized carriers would be in position to handle the business. Re Kidd (Colo.) 771.

52. An order was issued to the applicant for a certificate to operate a motor vehicle for hire, to show cause why the same should not be revoked P.U.R.1928A.

CERTIFICATES OF CONVENIENCE AND NECESSITY—*continued.*
and cancelled because of a failure to pay a tax or file monthly report of mileage traveled as provided by law (§§ 7, 10, House Bill No. 430). Re Bill's Sightseeing Co. (Colo.) 775.

53. Where a provision of the Commission law requires that upon issuance of a certificate of public convenience the same shall be put into operation within two years or become void for nonuser, a breach of such conditions does not of itself work a forfeiture, but such conditions are subsequent and to be taken advantage of, if at all, by the body granting it, and not as a matter of right by a collateral complainant, and the Commission may decide that progressive or gradual installation over the routes permitted is a substantial compliance, although certain portions of the permit were entirely unused for two years. Re Chicago Motor Coach Co. (Ill.) 564.

XI. Assignment or transfer.

Assignment of application for certificate, see infra, 55.

Annotation on assignment, transfer, and sale of certificates, pp. 111, 656.

54. The question whether there will be public convenience and necessity to be served by the continuation of operations under a certificate is not properly raised on an application for authorization of the transfer of the certificate. Re Kidd (Colo.) 771.

XII. Procedure.

Denial of authority to transfer certificate of convenience and necessity when copartners did not join in application, see PARTIES, 1.

Annotation on procedure in obtaining certificates, p. 657.

55. An application for a certificate of convenience and necessity should be dismissed when none of the original applicants are present at the hearing and two different parties appear who both claim to have purchased the business and rights of the original applicants, only one of which exhibits a signature of an original applicant. Re Butterbaugh (Colo.) 41.

56. Each applicant for a certificate of convenience and necessity authorizing motor truck service should state definitely the route or territory for which authority is sought, and the character of the service contemplated. Re Greyhound Co. (S. D.) 239.

57. Various individuals cannot operate motor trucks separately, and without any sort of financial connection, under one permit or certificate of authority, and upon the payment of but one statutory fee. Re Greyhound Co. (S. D.) 239.

CERTIORARI.

Rehearing of Commission proceeding in which railroad is ordered to extend siding on private property to adjoining land, see REHEARING, 1.

CHARTERS.

Charter duty to render adequate service, see SERVICE, 30.

CITIZENSHIP.

Denial of certificate on ground that applicant had not shown himself to be a citizen of the United States, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 34.

CLASS LEGISLATION.

Provision that Commission may not impose more than one-half of cost of viaduct construction upon highway commission, thereby permitting apportionment to railroad, as not unconstitutional class legislation, see CONSTITUTIONAL LAW, 15.

COMBINED UTILITIES.

Duty of grain elevator and electric company to keep proper accounts distinguishing operations, see ACCOUNTING, 2.

Charge to railway department of combined utility for electricity supplied by electric department, see RETURN, 4.

Reasonableness of return as a whole, see RETURN, 11.

COMMISSIONS.

I. Jurisdiction, powers, and duties, 1–19.

a. In general, 1–8.

b. Jurisdiction and powers over particular matters, 9–14.

1. Legal questions generally, 9–11.

2. Managerial questions, 12.

3. Validity of ordinances, 13, 14.

c. Power to issue injunction, 15.

d. Limitations on powers, 16–19.

II. Investigations, 20–23.

Review of Commission orders, see APPEAL AND REVIEW.

Section of Interstate Commerce Act providing for recapture of income from railroad as not invalid delegation of legislative power without prescribing method of procedure, see CONSTITUTIONAL LAW, 3.

Commission procedure generally, see PROCEDURE.

State regulation of toll rates as not giving utility exclusive right to maintain its bridges, see RATES, 2.

Refusal of Commission to interfere with contract between connecting companies providing for free interexchange of messages, see RATES, 33.

Temporary Commission order to test accuracy and reasonableness of proposed telephone rates as subject to review by court, see RATES, 39.

Notice to Commission as to terms and circumstances of equipment purchase before it permits withdrawal of utility funds for the purchase, see SECURITY ISSUES, 1, 2.

COMMISSIONS—*continued.*

I. Jurisdiction, powers, and duties.

a. In general.

Reservation of Commission right to order transportation whether on boulevards or central districts regardless of whether or not it is the announced policy of motor transportation utility to confine its operation to boulevards, see AUTOMOBILES, 1.

Jurisdiction, powers, and duties with respect to certificates of convenience and necessity, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 5–16.

Constitutionality of delegation of legislative power to Commission to make minor rules and regulations, see CONSTITUTIONAL LAW, 2.

Jurisdiction, power and duties with respect to crossings, see CROSSINGS, 8–14.

Jurisdiction and powers over discrimination, see DISCRIMINATION, 6, 7.

Jurisdiction over interstate commerce, see INTERSTATE COMMERCE.

Lack of Commission control over question of wage increases on street railway, see LABOR, 1.

Jurisdiction and powers over monopoly and competition, see MONOPOLY AND COMPETITION, 1–4.

Corporations subject to Commission regulation as public utilities, see PUBLIC UTILITIES.

Duty of Commission to determine character of railroad, see PUBLIC UTILITIES, 2.

Jurisdiction, powers, and duties with respect to rates, see RATES, 3–7.

Powers of Commissions over reparation, see REPARATION.

Jurisdiction and powers over service, see SERVICE, 3.

Annotation on jurisdiction, powers, and duties of Commissions, p. 233.

1. A rule releasing an electric utility from responsibility for the condition of consumers' equipment in its service is an attempt to limit the liability of a utility clearly beyond any grant of power to the Commission. Compton v. Alabama Power Co. (Ala. Sup. Ct.) 724.

2. The Indiana Commission is without jurisdiction over a petition for an order requiring a flagman or conductor on all light engine movements on the main track, either within or outside yard limits or both, to a point more than three miles distant from original starting point. Brotherhood of Locomotive Engineers v. All Railroads (Ind.) 668.

3. Prior to the Motor Bus Law of 1927, the Public Service Commission of Missouri had no jurisdiction over motor busses and whatever authority it now has must be specified by the terms of that act. Re Springfield Traction Co. (Mo.) 675.

4. Application of a traction utility to increase fares on its bus routes forming part of a municipal transportation system and lying for the most part within corporate limits will be dismissed for lack of jurisdiction under the Motor Bus Law (§ 1, 1927) providing that the act should not apply to motor vehicles transporting for hire over regular routes within or forming part of the transportation system of a municipal corporation where, prior to the act, the Commission had no jurisdiction over automobiles. Re Springfield Traction Co. (Mo.) 675.

COMMISSIONS—*continued.*

5. The Commission has no authority over the levying or collecting of a license tax where an act (Motor Bus Regulation Act of 1927, § 6) provides for its payment to the State Treasurer as well as the conditions under which it shall be paid. Re Worrell (Mo.) 793.

6. The jurisdiction over motor carriers given to the Commission by an act (Motor Bus Law 1927, § 2) defining a motor carrier as one who "operates between fixed termini over a regular route" does not extend the Commission's authority to carriers operating over irregular routes, not between fixed termini. Re Worrell (Mo.) 793.

7. For the purpose of ascertaining legislative intent, the Commission cannot properly pick out detached words or phrases in order to find jurisdiction in itself, without regard to the context, purpose, and intent of all the pertinent provisions of the Public Service Commission Law and all statutes, read and considered together. Re Chalmers (N. Y.) 332.

8. Department of the State Corporation Commission will not of its own motion take judicial notice of an ordinance by a city, and when upon petition of a city to force a railroad to maintain a highway viaduct over its track, it appears (Michie's Code—1924—revision of 1919) that the state had delegated to the city police power to pass an ordinance covering such highways, and no such ordinance is placed in evidence, the petition will be dismissed without prejudice to the city's right to ascertain the existence of such ordinance. Com. ex rel. Richmond v. Richmond, F. & P. R. Co. (Va.) 291.

b. Jurisdiction and powers over particular matters.

1. Legal questions generally.

Annotation on Commission jurisdiction over legal matters, p. 234.

Annotation on Commission jurisdiction to determine validity of statute, p 234.

Annotation on Commission jurisdiction over legal questions relating to contracts and franchises, p. 234.

9. A rule of the Commission providing that no statement of a utility employee shall bind the company, unless in writing and approved by an official thereof, is an attempt to deal with substantive law and clearly beyond any grant of power to the Commission. Compton v. Alabama Power Co. (Ala. Sup. Ct.) 724.

10. The determination by the Commission in a case in which the status and duties of a logging railroad alleged to be a common carrier are involved, must be made alone upon an application of the evidence presented at the hearing to the term "railroad" or the term "common carrier," as each is defined by the statutes governing and defining the powers and duties of the Commission. Codd v. McGoldrick Lumber Co. (Idaho) 545.

11. The Commission has no jurisdiction concerning the enforcement of the provisions of an ordinance requiring a traction company to make repairs to pavement in accordance with the terms thereof. Leonia v. New Jersey & H. R. R. & Ferry Co. (N. J.) 464.

2. Managerial questions.

Annotation on Commission's powers over managerial questions, p. 235.

12. While certain economies suggested by the Commission engineer as a substitute for a proposed re-entry of a telephone utility into an area, creating a burdensome duplication of service, cannot be forced upon the company by the Commission, the fact that the unsatisfactory conditions claimed by the utility could be thus improved without creating a less satisfactory condition otherwise, may be taken into consideration where the Commission's approval or disapproval is based upon a question of public necessity. Tioga County Bell Teleph. Co. v. Citizens' Mut. Teleph. & Teleg. Co. (Pa.) 712.

3. Validity of ordinances.

13. The Commission has no jurisdiction to pass upon the validity of a city ordinance limiting the load of any motor vehicle, truck, or trailer. Old Trails Express Co. v. Brazil (Ind.) 440.

14. The Commission has power to determine the validity of a city ordinance prohibiting automobiles for hire operating over a regular route from stopping to receive or discharge passengers on any street having street cars on it at that point, or forbidding any vehicle for hire to stand longer than five minutes at any one spot within the congested districts, notwithstanding the contention of the city that such ordinance is a regular traffic regulation enacted in the exercise of its authority over its highways. Gregg v. Terre Haute (Ind.) 534.

c. Power to issue injunction.

15. The Public Service Commission has jurisdiction (G. L. 5050, 5231) to entertain a petition to restrain a railroad from substituting inferior accommodation at an agency station. Royalton v. Central Vermont R. Co. (Vt. Sup. Ct.) 633.

d. Limitations on powers.

Action of district county court in judicially laying out highway which incidentally involves crossing at grade, as not affecting jurisdiction of Commission, see CROSSINGS, 10.

Lack of Commission authority to disturb finding of county court with respect to public necessity of grade crossing although it has power to determine manner, designate the point, and apportion the incident expense of such crossing, see CROSSINGS, 12.

16. The fact that a company complaining to the Commission against an alleged invasion of territory has gone into a court of equity to secure a temporary injunction to maintain the *status quo* does not terminate the jurisdiction of the Commission over the complaint. Clear Creek Power & Develop. Co. v. Public Service Commission (Colo.) 506.

17. The Commission as an administrative tribunal must operate under the law creating it, and its authority is restricted to that expressly and by necessary implication conferred upon it by the legislature. Codd v. McGoldrick Lumber Co. (Idaho) 545.

18. The law of the state imposes upon the Public Service Commission the duty to regulate rates and supervise the service of public utilities and

COMMISSIONS—*continued.*
no city, town, or village of the state can by ordinances or otherwise nullify or make inoperative such law although all municipalities still retain the control of the use of their streets. Re YellowaY (Mo.) 217.

19. Refusal of a State Commission to be guided by the decisions of the Supreme Court of the United States and of its own state to the effect that reproduction new less depreciation must be given consideration in the ascertainment of fair value would be a violation of their official oaths. Re Omaha & C. B. R. & Bridge Co. (Neb.) 689.

II. Investigations.

Burden of proof upon Commission to establish materiality of testimony sought to be elicited by interrogatories during investigation, see APPEAL AND REVIEW, 28.

Fact that material question asked by Commission involves personal affairs as not exempting witness from reply, see CONSTITUTIONAL LAW, 9.

Proper questioning of witness in Commission investigation, see EVIDENCE, 2–6.

Duty of public service corporations and stockholders to divulge corporate holdings, see PUBLIC UTILITIES, 4.

20. A reference was noted to advise the management of a utility which had refused to produce certain invoices requested by the Commission engineer that the law requires all information in possession of a public utility to be furnished to the Commission within the scope of its lawful operation. Re Home Teleph. Co. (Ind.) 445.

21. The Commission has both the power and duty under various sections of Public Service Commission Law to hold an investigation regarding the preparation of a plan of readjustment of transit conditions and to subpoena and examine witnesses in connection therewith. Gilchrist v. Dahl (N. Y. Sup. Ct. Sp. T.) 336.

22. A Commission in an investigation regarding a plan for the readjustment of a transit service, may not properly inquire into the "character" or "integrity" or alleged irregularities of conduct of the management of any corporation or its officers as a means to control the future conduct of others, the proper forum for such matters being in the criminal or equity courts. Gilchrist v. Dahl (N. Y. Sup. Ct. Sp. T.) 336.

23. A Commission examining witnesses in a proceeding for the sole purpose of acquiring information, and material necessary for a transit readjustment plan, cannot therein conduct an investigation to determine whether a section (54, Subd. 2) of Public Service Commission Law limiting the percentage of stock which a stock company may acquire in a public utility, has or has not been violated. Gilchrist v. Dahl (N. Y. Sup. Ct. Sp. T.) 336.

COMPETITION.

See also MONOPOLY AND COMPETITION.

Competition as affecting rates, see RATES, 8.

COMPLAINTS.

Lack of complaints against existing utility as reason for concluding the absence of need for additional service by competitor, see MONOPOLY AND COMPETITION, 14.

Time limitation for complaint asking reparation, see REPARATION, 2.

CONCLUSIVENESS OF FINDINGS.

Conclusiveness of findings generally, see APPEAL AND REVIEW, 13–23.

CONDITIONS.

Limitations in certificates of convenience and necessity, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 47–50.

CONFISCATION.

Confiscatory return, see RETURN, 24.

CONSENT.

Issuance of preliminary order providing that certificate will be granted after applicant has obtained municipal franchise, permit, ordinance, or other authority, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 27.

CONSOLIDATION, MERGER, AND SALE.

Amortization of excessive purchase price, see ACCOUNTING, 1.

Ordinance provision that purchaser of village electric utility shall furnish current to certain amount free of charge for ten-year period as not unlawfully discriminatory, see DISCRIMINATION, 12.

Sale of municipal plant, see MUNICIPAL PLANTS, 1–3.

Objection relating to possible interference with municipal acquisition as not material on application for authority to issue securities for refunding, see SECURITY ISSUES, 9.

Discussion of the effect of absorption of small utility property at figures in excess of real value on the rates of purchasing utility, p. 779.

1. To warrant reconsideration by the Commission of a former ruling refusing permission to a traction utility to purchase capital stock in a bus utility, evidence is necessary to show that the selling party still has in fact possession of the stock and is yet in a position to carry out the terms of the original contract. Re Indianapolis Street R. Co. (Ind.) 670.

2. The Commission will not decide the moot question of the advisability of a sale of capital stock by one utility to another where the contracting parties have no longer the ability to perform. Re Indianapolis Street R. Co. (Ind.) 670.

3. An ordinance requiring the sale of a municipal utility but omitting to require security for the performance of the purchaser is cured by a clause in the contract of purchase warranting freedom from encumbrance, dismantling, or alienation without the consent of the municipality. Stone v. Osborn (Ohio Ct. App.) 25.

CONSTITUTIONAL LAW.

I. In general, 1.
II. Delegation of powers, 2, 3.
III. Police power, 4–8.
IV. Personal and property rights, 9–16.
a. Due process, 9–14.
b. Equal protection of the law, 15.
c. Impairment of contracts, 16.
V. Retrospective legislation, 17, 18.

I. In general.

Order for Commission rehearing on reversal of Commission's finding of fact raised on appeal under constitutional provision, see APPEAL AND REVIEW, 2.

Questions of fact raised on appeal from Commission order as not reviewable under state constitutional provision, see APPEAL AND REVIEW, 4.

Waiver of constitutional objections, see APPEAL AND REVIEW, 27.

1. There is no occasion for a Federal Court to consider whether an ordinance violates the Federal Constitution if it is void under the state law. Hammond v. Schappi Bus Line (U. S. Sup. Ct.) 388.

II. Delegation of powers.

Annotation on delegation of powers, p. 498.

2. The delegation of a quasi legislative power to the Public Service Commission to make minor rules and rules necessary or appropriate for the administration of the general laws of the state is not a violation of the constitutional prerogative of the legislature. Compton v. Alabama Power Co. (Ala. Sup. Ct.) 724.

3. Section 15-A of the Interstate Commerce Act, providing for the recapture of excess income from railroads, is not invalid as a legislative power without prescribing a method of procedure, as it sets out completely the legislative rules and the only duty left to the Commission is the ascertainment of the fact in each case to which those rules are to be applied. St. Louis & O'Fallon R. Co. v. United States (U. S. Dist. Ct.) 740.

III. Police power.

Annotation on police power, p. 501.

4. The police power is one of the attributes of state sovereignty that cannot be limited by contract, and to the Commission has been committed the execution of this power over public utilities. (California Constitution, § 23, Art. 12; General Laws 1923, p. 2702). Sutter Butte Canal Co. v. Railroad Commission (Cal. Sup. Ct.) 811.

5. Chapter 113, S. L. 1923, providing for the regulation of the use of the public highways of the state by motor carriers for hire through the limitation of that use by the rule of public convenience and necessity, is a valid and constitutional exercise of the police power of the state to promote the public good, to preserve the public peace, and to protect the public welfare, and said act is not in contravention of any rights of the citizen guaranteed to him by the 14th Amendment to the Constitution of the United

CONSTITUTIONAL LAW—*continued.*
States, nor by § 7 of Article 2 of the Constitution of Oklahoma. Barbour v Walker (Okla. Sup. Ct.) 623.

6. An ordinance purporting to preserve public health but clearly designed to enforce collection of water rents is manifestly foreign to its alleged purpose and is an arbitrary, unreasonable, and unconstitutional infringement of property rights under the guise of police regulation. Etheredge v. Norfolk (Va. Sp. Ct. App.) 409.

7. The fact that a constant supply of water is necessary to seal sewer traps in city premises against the discharge of noxious gases and infectious insects emanating from the city mains is not a sufficiently substantial relation to public health to permit the enforcement, as a valid exercise of police power, of an ordinance holding owners personally liable for water consumed by their tenants regardless of contract. Etheredge v. Norfolk (Va. Sp. Ct. App.) 409.

8. An ordinance of a municipality engaged in furnishing water, which holds property owners personally responsible for the arrears of tenants, when otherwise void for lack of statutory authority, may be sustained only if proven to be a valid exercise of police power of the city. Etheredge v. Norfolk (Va. Sp. Ct. App.) 409.

IV. Personal and property rights.

a. Due process.

Confiscatory return, see RETURN, 24.

Order of Interstate Commerce Commission directing payment of excess railroad earnings over to Commission as not open to attack upon ground of wrongful valuation if net earnings, less amount paid over are not confiscatory, see RETURN, 26.

Annotation on due process, p. 499.

9. The fact that a material question asked by the Commission involves "personal affairs" does not exempt the witness from a reply on the ground of the constitutional guaranty of due process (Const. Art. 1, § 6). Gilchrist v. Dahl (N. Y. Sup. Ct. Sp. T.) 336.

10. There can be no taking of property without due process of law when an order is properly made requiring a railroad company to erect a new station. Norfolk & W. R. Co. v. Com. ex rel. State Corp. Commission (Va. Ct. App.) 397.

11. In the absence of statutory authority creating a property lien, by virtue of charter or otherwise, an ordinance of a municipality operating a water works which requires an owner to pay a delinquent bill for water furnished the tenant of his premises regardless of contractual obligations, is unreasonable and void. Etheredge v. Norfolk (Va. Sp. Ct. App.) 409.

12. A toll bridge company accepts its franchise from the state subject to and with notice of the right of the state to build a free bridge beside its structure and such construction is not, therefore, a confiscation of the utility's property. Muscoda Bridge Co. v. Muscoda (Wis. Sup. Ct.) 146.

13. A railroad electing to stand suit rather than yield to a Commission order authorizing a refund of excess demurrage, may assert any and all

CONSTITUTIONAL LAW—*continued.*
legitimate defenses that it may have or had to such order, and, therefore, its constitutional right to due process is undisturbed. Chicago, M. & St. P. R. Co. v. Railroad Commission (Wis. Sup. Ct.) 502.

14. An order of the Interstate Commerce Commission directing the payment of excess earnings into a reserve fund does not deny the full and unrestricted use of the carrier of what was its private property. St. Louis & O'Fallon R. Co. v. United States (U. S. Dist. Ct.) 740.

b. Equal protection of the law.

Annotation on equal protection and immunities, p. 500.

Annotation on special and class legislation, p. 501.

15. An amendment (Laws 1925, p. 322) providing that the Public Service Commission may not impose more than one-half of the cost of viaduct construction upon the highway commission, thereby permitting one-half of the cost to be apportioned to the railroad, is not unconstitutional as class legislation discriminating against the carrier, because prior to the amendment all of the cost could have been allotted to it and the amendment is general in its application. State ex rel. Missouri P. R. Co. v. Public Service Commission (Mo. Sup. Ct.) 615.

c. Impairment of contracts.

Police power as not to be limited by contract, see supra, 4.

Annotation on impairment of the right of contract, p. 500.

16. The issue of new bonds to take up outstanding valid obligations will be authorized even in excess of two-thirds of the value of paid up capital stock, notwithstanding a law (§ 462, Compiled Statutes of Nebraska, 1922) prohibiting an issuance of such proportions where the indebtedness was created by original bonds also issued in excess of two-thirds of the value of paid up capital stock but prior to the regulatory act, which may not, by retroaction, thus impair the obligation of a contract in violation of the Federal Constitution (Art. 1, § 10). Re Omaha & C. B. R. & Bridge Co. (Neb.) 689.

V. Retrospective legislation.

17. Where the State Constitution, Article 2, § 15, provides that legislation shall not be retrospective and different state statutes enact that judicial proceedings commenced under any law shall not be affected by subsequent acts repealing the same, a suit against a Public Service Commission under a law giving to that body discretion in regulating viaduct structures, is not subject to the operation of a later law making it mandatory, unless found impracticable by the Commission, that all viaducts shall be at least 22 feet above the track. State ex rel. Wabash R. Co. v. Public Service Commission (Mo. Sup. Ct.) 490.

18. Where a law prohibiting the construction of viaducts less than 22 feet over a railroad track, unless found impractical by the Public Service Commission, supersedes a former statute resting the discretion of viaduct regulation in the Commission, it creates a new and distinct right and not a mere procedural variance of the old power, and is, therefore, retrospective P.U.R.1928A.

XUM

CONSTITUTIONAL LAW—*continued.*
as regards proceedings commenced under the former law. State ex rel. Wabash R. Co. v. Public Service Commission (Mo. Sup. Ct.) 490.

CONSUMERS AND PATRONS.
Commission power to remove discrimination in irrigation rates by releasing old consumers, who have defrayed pioneer expenses, from burden of lien-bearing contract, see DISCRIMINATION, 6.
Value of telephone service to subscriber as affected by size of exchange, number of subscribers, see RATES, 9.
Disapproval of rates which would result in loss of essential patronage, see RATES, 11.
Benefit to consumers from conservative capitalization, see SECURITY ISSUES, 3.
Valuation of property paid for by consumers, see VALUATION, 13.

CONSUMPTION RATE.
Unlawful discrimination as not resulting from electric rate schedule under which customer by paying higher demand charge pays lower rate per kilowatt hour, see DISCRIMINATION, 3.

CONTINGENCIES.
Allowance for contingent reserve of street railway, see RETURN, 3.

CONTRACTS.
Carriage of members of baseball club over its circuit by motor bus under contract as illegal without certificate, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 24.
Defect in ordinance as cured by contract clause, see CONSOLIDATION, MERGER, AND SALE, 3.
Police power as not to be limited by contract, see CONSTITUTIONAL LAW, 4.
Impairment of contract, see CONSTITUTIONAL LAW, 16.
Invalidity of contract of county with respect to crossings, see CROSSINGS, 7.
Absence of discrimination in rates under contract to consumer involving extraordinary terms and conditions, see DISCRIMINATION, 2.
Requirement that rates to isolated subscriber must be reasonable in proportion to cost of service regardless of agreement, see DISCRIMINATION, 5.
Commission power to remove discrimination in irrigation rates by releasing old consumers, who have defrayed pioneer expenses, from burden of lien-bearing contract, see DISCRIMINATION, 6.
Preferential rates under contracts which may not have been discriminatory when created but have become so as required to give way whenever a rate regulatory body prescribes just and reasonable rates, see DISCRIMINATION, 11.
Anticompetition agreement between telephone companies, see MONOPOLY AND COMPETITION, 8, 9.

CONTRACTS—*continued.*

Disapproval of unexplained and irrelevant clause confirming right of railroad to operate lines within city in contract between these two parties, see MUNICIPALITIES, 1.

Company delivering packages for department stores under contract as not engaged in business of common carrier, see PUBLIC UTILITIES, 6.

Commission jurisdiction over rates fixed by contract, see RATES, 6, 7.

Contract rates, see RATES, 14.

Refusal of Commission to interfere with contract between connecting companies providing for free interexchange of messages, see RATES, 33.

Contract for service as not the basis of action by consumer for damages caused by fire resulting from defective installation, see SERVICE, 1.

Duty to serve as neither greater nor less by reason of contract for service where dedication of water has been made for lands by canal company, see SERVICE, 4.

1. The statute of frauds is not a valid defense in a negligence suit where the contract, alleged not to be performed in a year, is immaterial to the liability of plaintiff. Compton v. Alabama Power Co. (Ala. Sup. Ct.) 724.

CONVENIENCE.

See also CERTIFICATES OF CONVENIENCE AND NECESSITY.

Reversal of award, by Commissioner, of certificate for bus operation over route already served, under erroneous impression that it was his duty to grant the same on a finding of public convenience regardless of necessity, see APPEAL AND REVIEW, 26.

Meaning of phrase "public convenience and necessity," see SERVICE, 2.

COOKING.

Rates for current used by electrical refrigerators as discriminatory if higher than rates for ordinary domestic heating and cooking devices, see RATES, 18.

CORPORATIONS.

Withholding approval of rates pending investigation of evidence as to regularity of internal corporate relation, see RATES, 1.

COST OF MONEY.

Allowance for return of electric utility with consideration of present market quotations, see RETURN, 15.

COST OF SERVICE.

Cost and value of service as affecting reasonableness of rates, see RATES, 9–13.

COSTS AND EXPENSES.

Division of cost of viaduct, see CROSSINGS, 5.

COSTS AND EXPENSES—*continued.*

Assumption by State Commission of comparative accuracy of estimate of Interstate Commerce Commission as to probable cost of union station, see INTERSTATE COMMERCE, 2.

Operating expenses and other deductions from gross revenues, see RETURN, 3–10.

Cost as a factor in valuation, see VALUATION, 6–11.

Relation of working capital to operating expenses, revenues, and collection periods, see VALUATION, 22.

COUNTERCLAIM.

Action on counterclaim, see PROCEDURE, 1.

COUNTY.

Invalidity of contract of county with respect to crossings, see CROSSINGS, 7.

COUNTY COMMISSIONERS.

Testimony of county commissioners as to public convenience and necessity, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 36.

COURTS.

Review of court and Commission decisions, see APPEAL AND REVIEW.

Limitation on Commission action, see COMMISSIONS, 16–19.

Action of district county court in judicially laying out highway which incidentally involves crossing at grade as not affecting jurisdiction of Commission, see CROSSINGS, 10.

Lack of Commission authority to disturb finding of county court with respect to public necessity of grade crossing although it has power to determine manner, designate the point, and apportion the incident expense of such crossing, see CROSSINGS, 12.

Rehearing of Commission proceeding in which railroad is ordered to extend siding on private property to adjoining land, see REHEARING, 1.

Suit in state court to recover amount of excessive charge upon refusal of carrier to make refund authorized by Commission, see REPARATION, 5.

1. A supreme court of New York in special term is not at liberty to disregard the ruling of five judges constituting a majority of the court of appeals of that state in a decision directly in point concerning the materiality and pertinency of certain questions asked of a witness by the Commission, nor may it adopt the views of two dissenting judges in the same case. Gilchrist v. Dahl (N. Y. Sup. Ct. Sp. T.) 336.

CROSS EXAMINATION.

Sustaining objection to question on cross-examination in proceeding to restrain railroad from substituting caretaker for agency service at certain station, see EVIDENCE, 12.

CROSSINGS.

I. In general, 1–7.
II. Jurisdiction, powers, and duties of Commissions, 8–14.

I. In general.

Suit against Commission under law giving body discretion in regulating viaduct structures as not subject to operation of later law making it mandatory unless found impracticable by the Commission that all viaducts should be at least 22 feet above track, see CONSTITUTIONAL LAW, 17, 18.

Construction of statute providing for maintenance of viaducts by railroads, see STATUTES, 1.

Annotation on establishment of grade crossings, p. 322.
Annotation on elimination of grade crossings, p. 323.
Annotation on protection at grade crossings, p. 325.

1. Grade separations, in general, are of great practical value to the railroads, relieving them from penalties, cost of crossing protection, delays in movements, and possible damages in accident cases. Re Rogers (Mich.) 781.

2. Approaches are part of a bridge for purposes of apportionment of construction expense. State ex rel. Missouri P. R. Co. v. Public Service Commission (Mo. Sup. Ct.) 615.

3. The fact that local needs may not require an overhead crossing is not controlling in the determination of a Public Service Commission as to the necessity for establishing the same where the route thus served is a link in the program for an extensive highway system. State ex rel. Missouri P. R. Co. v. Public Service Commission (Mo. Sup. Ct.) 615.

4. There should be no delay in constructing an overhead or subway crossing at a railroad yard pending changes in the yard although for a number of years a large number of persons may have developed a sense of rail traffic and knowledge of the best means of making the perilous journey over or under cars. County Comrs. of Flathead County v. Great Northern R. Co. (Mont.) 457.

5. A railroad company which is primarily responsible for a dangerous condition at a railroad yard where persons have crossed over and under the cars apparently without protest by the company should bear the greater portion of the expense necessary to eliminate the condition by constructing an overhead crossing. County Comrs. of Flathead County v. Great Northern R. Co. (Mont.) 457.

6. An overhead crossing was considered preferable to a subway on the ground that a subway is not always a safe place and is frequently resorted to by questionable characters for unlawful purposes. County Comrs. of Flathead County v. Great Northern R. Co. (Mont.) 457.

7. Where a statute (subsec. 39, § 1294d Pollard's Code 1904) provides that "existing" highway crossings on, above or below grade, shall be positively maintained by railroads whose lines they cross, a contract for consideration between a county and a railroad, whereby the county purports to assume in whole or in part such obligations of maintenance, is void for

CROSSINGS—*continued.*
lack of delegated power to the county to exercise the police power of the state in that particular; and such stipulations of attempted release are null and void regardless of considerations of public policy. Com. ex rel. Richmond v. Richmond, F. & P. R. Co. (Va.) 291.

II. Jurisdiction, powers, and duties of Commissions.

Annotation on jurisdiction, powers, and duties of Commissions, p. 321.

8. The statute relating to improved highways (§ 18, Chap. 264, Laws 1917), contained, among other things, the following: "The State Highway Commission, upon the request of any county or township board, may require suitable safety devices or warning signals at dangerous or obscure railroad crossings to indicate the approach of trains, which shall be installed and maintained by the railroad company." This was amended (§ 5, Chap. 245, Laws 1919), by changing the period at the end of the sentence to a semicolon and adding the following: "and the state highway Commission may require the removal of spoil banks and other obstructions to view, and the grading of approaches to the tracks; the cost of which shall be borne by the railroad company and county or township jointly or severally in the proportions determined by the State Highway Commission." *Held*, the last clause relates to the cost of the removal of spoil banks and other obstructions to view, and the grading of approaches to the tracks and does not relate to the cost of installation and maintenance of suitable safety devices or warning signals at dangerous or obscure railroad crossings. Atchison, T. & S. F. R. Co. v. State Highway Commission (Kan. Sup. Ct.) 326.

9. The Commission has statutory power (under Act No. 114 of Public Acts, 1925) to determine the necessity and means for grade separation as well as to apportion the cost thereof, where the proposed construction is beyond the corporate limits of a city having a population of over 6000. Re Rogers (Mich.) 781.

10. The action of a district county court in judicially laying out a highway which incidentally involves the establishment of a crossing at grade does not in any way affect the jurisdiction of the Commission under a statute (§ 4663, General Statutes 1923) providing that no highway should be laid out over a railroad so as to cause a crossing at grade without the approval of the Commission. Moede v. Chicago, M. & St. P. R. Co. (Minn.) 785.

11. The Commission has no authority over private crossings, and in the absence of a showing that certain grade crossings are public, the Commission is not justified in ordering them closed. Stoddard County v. St. Louis-S. F. R. Co. (Mo.) 788.

12. The Public Service Commission has no authority to disturb the finding of a county court with respect to the public necessity of a grade crossing, but it is authorized to determine the manner, designate the point, and apportion the incidental expense of such crossing. Stoddard County v. St. Louis-S. F. R. Co. (Mo.) 788.

13. The Commission has no authority to order the construction of a particular type of crossing beyond exercising the statutory authority in P.U.R.1928A.

CROSSINGS—*continued.*
determining whether or not it shall be a subway or an overhead crossing. County Comrs. of Flathead County v. Great Northern R. Co. (Mont.) 457.

14. The Public Utility Commission has exclusive jurisdiction to grant permission for railroad grade crossings over streets and highways and to regulate the same. All previous powers delegated to cities and towns in this respect are superseded. Harrison v. United New Jersey R. & Canal Co. (N. J. Ch.) 735.

DAMAGES.

Overruling demurrer to plea of statute of frauds improperly interposed as defense to suit for damages resulting from fire caused by defective wiring as prejudicial error, see APPEAL AND REVIEW, 24.

Exception to court ruling admitting evidence of rules of Commission regulating electric wiring as ground for reversal, see APPEAL AND REVIEW, 25.

Contract for service as not the basis of action by consumer for damages caused by fire resulting from defective installation, see SERVICE, 1.

Damage to paving by street car operation, see STREET RAILWAYS, 1–3.

DANGER.

Danger at railroad crossing, see CROSSINGS.

DECISIONS.

Duty of Commission to follow decisions of superior court to the effect that reproduction cost new less depreciation must be given consideration in ascertaining fair value, see COMMISSIONS, 19.

Supreme Court is not at liberty to disregard ruling of court of appeals and to adopt views of dissenting judges, see COURTS, 1.

DEDICATION.

Duty to serve as neither greater nor less by reason of contract for service where dedication of water has been made for lands by canal company, see SERVICE, 4.

DEFECTIVE WIRING.

Overruling demurrer to plea of statute of frauds improperly interposed as defense to suit for damages resulting from fire caused by defective wiring as prejudicial error, see APPEAL AND REVIEW, 24.

DELEGATION OF POWERS.

See CONSTITUTIONAL LAW, 2, 3.

DEMAND CHARGE.

Unlawful discrimination as not resulting from electric rate schedule under which customer by paying higher demand charge pays lower rate per kilowatt hour, see DISCRIMINATION, 3.

DEPARTMENT OF PUBLIC WORKS.
See COMMISSIONS.

DEPOSIT.
Deposit to insure payment, see PAYMENT, 2.

DEPRECIATION.
1. An annual depreciation fund of 1.5 per cent of the original cost of depreciable property used and useful, assuming earned interest on the same, was allowed in the valuation of a water utility plus 1 per cent of the cost of subsequent additions. Re East St. Louis & I. Water Co. (Ill.) 57.
2. The depreciation fund is intended to return to the utility at the expiration of useful life of any unit the original and not the reproduction cost thereof. Re East St. Louis & I. Water Co. (Ill.) 57.
3. The balance in reserve for accrued depreciation was found to be excessive and the rate for the same reduced to 3 per cent per annum on the cost of depreciable property in service. Re Home Teleph. Co. (Ind.) 445.
4. An allowance was made for depreciation or retirement expense in determining the necessary rate of a public utility. Starkweather v. Northern Utilities Corp. (N. D.) 699.

DISCONTINUANCE.
Service discontinuance to enforce payment of disputed bill, see PAYMENT, 3.
Abandonment and discontinuance of service, see SERVICE, 11–21.

DISCOUNTS.
Gross and net telephone rates, see PAYMENT, 1.

DISCRIMINATION.

I. In general, 1–5.
II. Jurisdiction and powers of Commissions, 6, 7.
III. Concessions to particular classes or persons, 8–12.

I. In general.

Rates for current used by electrical refrigerators as discriminatory if higher than rates for ordinary domestic heating and cooking devices, see RATES, 18.
Statutory provision requiring equality of accommodations by railroad as meaning reasonable as well as equal facilities, see SERVICE, 5.

Annotation on discrimination in automobile rates, p. 89.
Annotation on discrimination in railroad rates, p. 90.
Annotation on discrimination in telephone rates, p. 92.
Annotation on discrimination in water rates, p. 94.
Discussion of whether free interexchange between two neighboring towns is a discrimination against other pairs of communities so situated on a different telephone system, p. 525.

DISCRIMINATION—*continued.*

1. Irrespective of whether a telephone utility is making a reasonable return on its investment without toll charges, the rendition of free interexchange to a comparative few at the expense of all subscribers is a discrimination which should not be tolerated where the exchanges are situated in two separate towns constituting separate business and social communities. Re Montezuma County Teleph. Co. (Colo.) 518.

2. Rates under contract to a consumer involving extraordinary terms and conditions which no other consumer is in a position to receive cannot be termed discriminatory as against any other class of service. Menominee & M. Light & Traction Co. (Mich.) 87.

3. Unlawful discrimination does not result from an electric rate schedule under which a customer by paying a higher demand charge pays a lower rate per kilowatt hour, since the circumstances and conditions of service with respect to the consumers would not be similar. Ashton v. Northern Pennsylvania Power Co. (Pa.) 236.

4. Free toll service between telephone exchanges is a form of discrimination in rates that should be discontinued. Re State Teleph. Co. (Wis.) 249.

5. The rates of a telephone utility to an isolated subscriber must at least be reasonably proportionate to the cost of supplying service over his line regardless of an agreement by the utility whereby a contact rental was paid instead of constructing a line extension in accordance with a prior agreement. Re Prentice Mut. Teleph. Co. (Wis.) 613.

II. Jurisdiction and powers of Commissions.

6. The Commission has power to remove discrimination in irrigation rates by releasing old consumers who have defrayed pioneer expenses from the burden of lien-bearing contracts and allowing them the same advantages as new consumers without contract. Sutter Butte Canal Co. v. Railroad Commission (Cal. Sup. Ct.) 811.

7. In fixing a rate to be charged by a railway company, the Corporation Commission is not confined to the sole question of the reasonableness of the rate. It may be reasonable, yet, if it discriminates in favor of one locality as against another, it should be corrected. Kansas, O. & Gulf R. Co. v. State (Okla. Sup. Ct.) 825.

III. Concessions to particular classes or persons.

Annotation on concessions to particular parties, p. 94.

8. Unexplained free service to business phones is an unlawful discrimination and should be discontinued. Re Mountain States Teleph. & Teleg. Co. (Idaho) 269.

9. Free service to a municipality is an unlawful discrimination and should be discontinued. Re Mountain States Teleph. & Teleg. Co. (Idaho) 269.

10. A total exemption from proposed increased rates of customers using large amounts of water each month upon proof that such customers could as cheaply supply themselves and might withdraw if charged the increase, thereby appreciably diminishing the total revenue of the utility, was refused and a portion of the increase was levied on such customers in what P.U.R.1928A.

DISCRIMINATION—*continued.*
was believed to be a more equitable adjustment of the burden of necessitated increased rates, which would also sustain the patronage of such wholesale users. Re East St. Louis & I. Water Co. (Ill.) 57.

11. Preferential rates under contracts which may not have been discriminatory when created but have become so under changing conditions must give way whenever a rate regulatory body prescribes just and reasonable general rates. Re Mountain Water Service Co. (N. J.) 287.

12. An ordinance provision that the purchaser of a village electric utility shall furnish current to a certain amount free of charge to the village for ten years is not unlawfully discriminatory. Stone v. Osborn (Ohio Ct. App.) 25.

DISPUTES.

Service discontinuance to enforce payment of disputed bill, see PAYMENT, 3.

DIVIDENDS.

Stock dividends and surplus as expressing measure of going value, see VALUATION, 28.

Use of property measured by revenue derived therefrom expressed in dividends and surplus as determining going value, see VALUATION, 29.

DONATIONS.

Sum donated by assessed consumers to contribute to construction at peak prices of emergency pumping station as a factor in valuation, see VALUATION, 13.

DUE PROCESS.

See CONSTITUTIONAL LAW, 9–14.

DUPLICATION.

Effect of utility's refusal of suggestion as to economies to avoid re-entry into area, creating burdens of duplication of service, see COMMISSIONS, 12.

Absence of duplicity in ordinance requiring village to lease electric plant, sell equipment, and grant franchise, see ORDINANCES, 1.

DUTIES.

Of Commissions with respect to certificates of convenience and necessity, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 5–16.

Of Commissions generally, see COMMISSIONS, 1–19.

Of Commission with respect to crossings, see CROSSINGS, 8–14.

Of Commissions with respect to rates, see RATES, 3–7.

EARNINGS.

Generally, see RETURN.

EARNINGS—*continued.*

Question whether operation as a whole can be made to pay as a factor in authorizing motor bus operation, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 32.

Order of Interstate Commerce Commission directing payment of excess earnings into reserve fund as not denying use of railroad of what was its private property, see CONSTITUTIONAL LAW, 14.

EASEMENTS.

Lack of Commission jurisdiction to order railroad to extend siding on private property, see SERVICE, 3.

ECONOMIES.

Requirement that utility be allowed rates which, under reasonably prudent and economical management, will yield return sufficient to enable it to sell stock, see RETURN, 12.

Allowance of increased rates rather than serious impairment of service by proposed operating economies, see RETURN, 17.

ELECTRICITY.

Duty of grain elevator and electric company to keep proper accounts distinguishing operations, see ACCOUNTING, 2.

Overruling demurrer to plea of statute of frauds improperly interposed as defense to suit for damages resulting from fire caused by defective wiring as prejudicial error, see APPEAL AND REVIEW, 24.

Exception to court ruling admitting evidence of rules of Commission regulating electric wiring as ground for reversal, see APPEAL AND REVIEW, 25.

Certificate as not required retroactively approving and authorizing construction which took place prior to act requiring certificate, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 20.

Issuance of preliminary order providing that certificate will be granted after applicant has obtained municipal franchise, permit, ordinance, or other authority, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 27.

Power of Commission to limit liability for electric service, see COMMISSIONS, 1.

Absence of discrimination in rates under contract to consumer involving extraordinary terms and conditions, see DISCRIMINATION, 2.

Unlawful discrimination as not resulting from electric rate schedule under which customer by paying higher demand charge pays lower rate per kilowatt hour, see DISCRIMINATION, 3.

Ordinance provision that purchaser of village electric utility shall furnish current to certain amount free of charge for ten-year period as not unlawfully discriminatory, see DISCRIMINATION, 12.

Current generated in foreign state by power utility whose only local equipment is of stand-by character as interstate commerce, see INTERSTATE COMMERCE, 4.

ELECTRICITY—*continued.*

Commission jurisdiction to determine questions raised by complaint against invasion of territory by electric utility, see MONOPOLY AND COMPETITION, 1.

Sale of municipal electric plant, see MUNICIPAL PLANTS, 1–3.

Absence of duplicity in ordinance requiring village to lease electric plant, sell equipment, and grant franchise, see ORDINANCES, 1.

Rapid transit utilities organized as railroads and not as electrical corporations for purpose of doing railroad business which sells some of surplus power as not electrical corporation or subject to Commission jurisdiction, see PUBLIC UTILITIES, 12.

Electric rates, see RATES, 18–22.

Authorization of experimental active-room rate schedule, see RATES, 37, 38.

Charge to railway department of combined utility for electricity supplied by electric department, see RETURN, 4.

Reasonableness of return as a whole, see RETURN, 11.

Return of electric utility, see RETURN, 14–16.

Contract for service as not the basis of action by consumer for damages caused by fire resulting from defective installation, see SERVICE, 1.

Discontinuance of service because of tampering with meter to divert electric current, see SERVICE, 13.

Electric service, see SERVICE, 26.

ELECTRIC RAILWAYS.

Competition by transportation companies, see MONOPOLY AND COMPETITION, 11–27.

EMERGENCY.

Valuation of stand-by equipment, see VALUATION, 18–20.

EMPLOYEES.

Invalidity of Commission rule providing that no statement of utility employee shall bind company unless in writing and approved by official thereof, see COMMISSIONS, 9.

Testimony as to what employees said were the duties of his employment as inadmissible against employer, see EVIDENCE, 10.

EMPLOYMENT.

Unemployment as a factor affecting authorization of automobile service in competition with traction company, see MONOPOLY AND COMPETITION, 23.

EMPLOYMENT AGENCY.

Employment agency operating automobiles to transport laborers as a public carrier subject to Commission regulation, see PUBLIC UTILITIES, 7.

ENGINEERING.

Payment of percentage of gross revenues of water utility to parent company in lieu of salaries of general officers in recompense for engineering, accounting, and other services, see RETURN, 7.

EQUAL PROTECTION.

See CONSTITUTIONAL LAW, 15.

EQUIPMENT AND CONSTRUCTION.

Certificate as not required retroactively approving and authorizing construction which took place prior to act requiring certificate, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 20.

Solicitation of business and cost of equipment as affecting rates for air heating, see RATES, 21, 22.

Notice to Commission as to terms and circumstances of equipment purchase before it permits withdrawal of utility funds for the purchase, see SECURITY ISSUES, 1, 2.

Rules and regulations governing construction, operation, and maintenance of electric lines and equipment, see SERVICE, 26.

Ownership of telephone instruments and payment of rental therefor, see SERVICE, 34.

EVIDENCE.

Unchallenged findings being found sufficient to support judgment, exceptions to other findings as not necessary to be considered, see APPEAL AND REVIEW, 7.

Testimony relative to inadequacy of present service as irrelevant in proceeding in which operation without certificate is complained against, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 3.

Of necessity for service, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 35–42.

Power to compel production of invoices requested by Commission engineer, see COMMISSIONS, 20.

Fact that material question asked by Commission involves personal affairs as not exempting witness from reply, see CONSTITUTIONAL LAW, 9.

Inadvertent admission of immaterial testimony recognized as such by chairman of Commission, and discarded from consideration in formulating order, as not invalidating the order, see PROCEDURE, 4.

Duty of public service corporations and stockholders to divulge corporate holdings, see PUBLIC UTILITIES, 4.

Withholding approval of rates pending investigation of evidence as to regularity of internal corporate relations, see RATES, 1.

Commission findings as prima facie evidence of truth of facts found by it, see REPARATION, 5.

1. An inventory of water and sewer mains made up from actual records usually consisting of field books, individual cards, or other records showing sizes, lengths, and exact locations, in the absence of conflicting P.U.R.1928A.

EVIDENCE—*continued.*
evidence, was accepted in valuing the mains, although it did not check up with quantities taken by scaling the map showing the system, in view of the fact that city maps could not be depended upon to disclose the actual lengths of the mains. Re Lakewood Water Co. (N. J.) 705.

2. The advice of counsel is no justification for the refusal of a witness to answer legal, constitutional, and material questions of the Commission. Gilchrist v. Dahl (N. Y. Sup. Ct. Sp. T.) 336.

3. Whether questions asked by a Commission of a witness during an investigation are material and pertinent must be determined by the courts upon affirmative proof, and it is not sufficient that the Commission itself or its counsel deems them so. Gilchrist v. Dahl (N. Y. Sup. Ct. Sp. T.) 336.

4. Where a witness has himself disregarded corporate fiction and has personally assumed all responsibility for the conduct of a corporation which he owns and its stock purchases, questions by the Commission at an investigation into transit readjustment seeking to probe further into the internal relationship are irrelevant, immaterial, and foreign. Gilchrist v. Dahl (N. Y. Sup. Ct. Sp. T.) 336.

5. Questions by a Commission investigating activities of corporations in connection with the readjustment of transit conditions, are immaterial and irrelevant when they seek to elicit information as to when, what terms, and for what consideration, a witness purchased stock in corporations being investigated. Gilchrist v. Dahl (N. Y. Sup. Ct. Sp. T.) 336.

6. A Commission investigating a plan for the readjustment of transit service may not properly ask when a witness bought stock in a transit company and how much he paid for it, such question not being material or pertinent. Gilchrist v. Wiggin (N. Y. Sup. Ct. Sp. T.) 381.

7. A conclusion that an expert's testimony, offered by a utility in regard to matters of valuation for a proposed rate increase, concerning which other evidence at trial affords a test, is colored by personal financial interest of the witness and of questionable value, may be a just ground for refusal to approve as accurate the submitted rate base. Public Utilities Commission v. East Providence Water Co. (R. I. Sup. Ct.) 141.

8. An offer to show by oral testimony the contents of a letter, the absence of which was unaccounted for, was properly excluded by the Commission. Royalton v. Central Vermont R. Co. (Vt. Sup. Ct.) 633.

9. Testimony of an incident was correctly excluded as improper where its materiality depended upon the time of its occurrence which was not offered in proof. Royalton v. Central Vermont R. Co. (Vt. Sup. Ct.) 633.

10. Testimony as to what an employee said were the duties of his employment is inadmissible against his employer at a Commission hearing until his authority to speak concerning the matter is established by other than his own declaration. Royalton v. Central Vermont R. Co. (Vt. Sup. Ct.) 633.

11. An exception to an exclusion of evidence at a hearing by the Commission is unavailing unless an offer was made to show what was expected to be proven. Royalton v. Central Vermont R. Co. (Vt. Sup. Ct.) 633.

12. In a Commission proceeding to restrain a railroad from substituting

EVIDENCE—*continued.*
care-taker for agency service at a certain station, an objection to a question, on cross-examination of a witness for the carrier, asking whether the proposed economy could not be effected by making the substitution at some other station, was properly sustained as having no bearing on the issues at hand. Royalton v. Central Vermont R. Co. (Vt. Sup. Ct.) 633.

13. Inadmissible testimony permitted by the Commission over the valid objection that the witness is not qualified to give such evidence is rendered harmless if the witness is later allowed to testify to substantially the same thing without objection. Royalton v. Central Vermont R. Co. (Vt. Sup. Ct.) 633.

14. Erroneous admission into evidence by the Commission at a hearing of a prepared report in corroboration of a witness' testimony over the valid objection of the opposition was not prejudicial error where the only controverted matters contained therein were already substantially placed in evidence by the oral testimony of the witness without dispute. Royalton v. Central Vermont R. Co. (Vt. Sup. Ct.) 633.

EXCHANGES.

Value of telephone service to subscriber as affected by size of exchange, number of subscribers, business and resident, density of population, size, character, saturation, and economic condition of territory served and nature of use made of service, see RATES, 9.

EXPERIMENTAL RATE.

Authorization of experimental active-room rate schedule, see RATES, 37, 38.

EXPERTS.

Credibility of expert testimony as affected by personal interest of witness, see EVIDENCE, 7.

EXPRESS.

Power of Missouri Commission as limited to motor transportation of persons and not of property, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 12.

EXTENSIONS.

Commission order for extension of railroad siding as not disturbed by court because of claim that extension is not workable on account of grades, where there is evidence reasonably supporting finding that extension is workable, see APPEAL AND REVIEW, 15.

Extensions of service, see SERVICE, 7–10.

FAIR VALUE.

Fair value as the basis of return, see RETURN, 1.

FARM PRODUCTS.

Consideration of hauling farm products in conjunction with hauling of other articles as evidence of public necessity notwithstanding statute exempting from regulation of motor vehicles operated exclusively in transporting agricultural products, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 42.

FEES.

Denial of right of various individuals to operate motor trucks separately and without any sort of financial connection, under one permit or certificate, and upon payment of but one statutory fee, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 57.

FILING.

Right of utility to reduce rates without formality of hearing by merely filing new schedule with Commission, see RATES, 5.

FINANCES.

Question whether operation as a whole can be made to pay as a factor in authorizing motor bus operation, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 32.

Financial responsibility as a proper consideration in determining which applicant should receive a certificate for motor carrier service, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 46.

Denial of right of various individuals to operate motor trucks separately and without any sort of financial connection, under one permit or certificate, and upon payment of but one statutory fee, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 57.

Reorganization plan of street railway, see SECURITY ISSUES, 4–7.

FINDINGS.

Exceptions to failure of Commission to make findings as not overruled on appeal where record fails to show any request for such findings, see APPEAL AND REVIEW, 8.

FINES AND PENALTIES.

Utility as not to be penalized for reliance upon decision subsequently overruled, see APPEAL AND REVIEW, 1.

FIRE.

Overruling demurrer to plea of statute of frauds improperly interposed as defense to suit for damages resulting from fire caused by defective wiring as prejudicial error, see APPEAL AND REVIEW, 24.

FIRE PROTECTION.

Water rates for hydrant service, see RATES, 36.

FRANCHISES.

Issuance of preliminary order providing that certificate will be granted after applicant has obtained municipal franchise, permit, ordinance, or other authority, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 27.

Construction of bridge by state to compete with toll bridge company operating under state franchise as not confiscatory, see CONSTITUTIONAL LAW, 12.

Toll bridge utility operating under indeterminate permit as not protected from competition by law expressly limiting such protection to heat, light, water, power, and telephone utilities, see MONOPOLY AND COMPETITION, 6.

Absence of duplicity in ordinance requiring village to lease electric plant, sell equipment, and grant franchise, see ORDINANCES, 1.

Valuation of stand-by equipment which is required by franchise, see VALUATION, 18–20.

Annotation on franchises, p. 150.

Annotation on termination of franchises, p. 151.

1. Mandatory statutes altering, amending, or repealing existing franchises of specifically mentioned public utilities and creating indeterminate permits must be strictly construed, and only such utilities as are expressly designated are affected thereby. Muscoda Bridge Co. v. Muscoda (Wis. Sup. Ct.) 146.

2. A statute declaring a particular utility to be a public utility need not have the effect of bringing it under a former law (1907, Chap. 499) giving public utilities the right to exchange franchises for indeterminate permits, nor can it make the utility subject to a subsequent statute (1911, Chap. 596) making mandatory the surrender but specifically designating the utilities so affected. Muscoda Bridge Co. v. Muscoda (Wis. Sup. Ct.) 146.

FRAUD.

Statute of frauds as not a valid defense in negligence suit where contract is immaterial to liability, see CONTRACT, 1.

FREE INTEREXCHANGE SERVICE.

Free interexchange service as discriminatory, see DISCRIMINATION, 1, 4.

FREE SERVICE.

Unexplained free service to business phones as unlawful, see DISCRIMINATION, 8.

Free service to municipality as unlawful, see DISCRIMINATION, 9.

FREIGHT.

Return as a whole with respect to right to discontinue unprofitable service, see SERVICE, 11.

FUNDS.
Order of Interstate Commerce Commission directing payment of excess earnings into reserve fund as not denying use of railroad of what was its private property, see CONSTITUTIONAL LAW, 14.
Validity of order of Interstate Commerce Commission providing for recapture of excess earnings and for payment into reserve fund, see RETURN, 28.

GAS.
Gas rates, see RATES, 23.
Reasonableness of return as a whole, see RETURN, 11.
Gas service, see SERVICE, 27.

GOING VALUE.
Treatment of, in valuation, see VALUATION, 25–30.

GRADE CROSSINGS.
See CROSSINGS.

GRAIN ELEVATOR.
Duty of grain elevator and electric company to keep proper accounts distinguishing operations, see ACCOUNTING, 2.

GROSS RATES.
Gross and net telephone rates, see PAYMENT, 1.

GROSS RECEIPTS TAX.
Charges to operating expenses of street railway for street paving costs and gross receipts tax, see RETURN, 5.

GROUNDED LINES.
Change from grounded lines to metallic lines as affecting operating expenses, see RETURN, 10.
Approval of program to metallicize grounded lines, see SERVICE, 35.

HEATING.
Rates for current used by electrical refrigerators as discriminatory if higher than rates for ordinary domestic heating and cooking devices, see RATES, 18.
Electric rates for air heating, see RATES, 21, 22.

HEATING QUALITY.
Gas rates as affected by B.T.U. in gas supplied, see RATES, 23.
Gas utility standards, see SERVICE, 27.

HIGHWAYS AND STREETS.
Granting or refusing of certificate by Commission does not take away existing right of municipality to control of streets, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 28.

HIGHWAYS AND STREETS—*continued.*

Lack of Commission jurisdiction to enforce provisions of ordinance requiring traction company to make repairs to pavement, see COMMISSIONS, 11.

Provision for use of highway by motor carriers for hire as valid constitutional exercise of police power, see CONSTITUTIONAL LAW, 5.

Construction of bridge by state to compete with toll bridge company operating under state franchise as not confiscatory, see CONSTITUTIONAL LAW, 12.

Crossings of railroad, see CROSSINGS.

Refusal of monopolistic protection to toll bridge as grounded on intention that state shall not be hampered in governmental function of providing public with highways, see MONOPOLY AND COMPETITION, 5.

Authorization of abandonment of street railway service along streets about to be resurfaced or repaved, see SERVICE, 15.

Damage to highway by automobiles as affecting right to curtail passenger train service and substitute motor busses, see SERVICE, 22.

Damage to paving by street car operation, see STREET RAILWAYS, 1–3.

HOSPITAL.

Grant of certificate to one of two applicants who possesses permit or authorization from Secretary of War to transport passengers in and upon grounds of Federal hospital, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 43.

HYDRANTS.

Water rates for hydrant service, see RATES, 36.

ILLEGAL ISSUES.

Issuance of bonds in excess of two-thirds of amount of paid up capital stock notwithstanding law prohibiting issuance in such proportion where purpose is to take up valid and outstanding obligation created by original bond issue, see SECURITY ISSUES, 8.

IMPAIRMENT OF CONTRACTS.

See CONSTITUTIONAL LAW, 16.

IMPROVEMENTS.

Recognition of expense of improvements in service, see RETURN, 13.

INCOME.

Generally, see RETURN.

INCORPORATION.

Commission approval of incorporation of motor transportation company as not conferring right to operate without certificate covering each route, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 26.

INDETERMINATE PERMIT.
See FRANCHISES.

INDUSTRIAL RAILROAD.
Lumber company owning and operating logging railroad for hauling its own products as neither a railroad corporation, a common carrier, nor a public utility, see PUBLIC UTILITIES, 11.

INFORMAL DOCKET.
Nature of informal docket of Michigan Commission, see PROCEDURE, 3.
Commission authority to handle reparation matters in an informal manner, see REPARATION, 1.

INJUNCTION.
See also APPEAL AND REVIEW.
Appeal from interlocutory decree denying preliminary injunction to restrain operation of ordinance as not a submission of cause for final judicial determination, see APPEAL AND REVIEW, 12.
Commission power to issue injunction, see COMMISSIONS, 15.
Limitation on Commission action, see COMMISSIONS, 16–19.

1. There is no provision of law to warrant the issuance of an injunction restraining, pending an appeal, the operation of motor carrier under a certificate of convenience and necessity, which has been protested. Cooper v. McWilliams & Robinson (Ky. Ct. App.) 731.

2. The fact that a litigant has asked for an injunction to which he is plainly not entitled cannot operate to deprive him of other remedies which he is authorized to receive under the law. Cooper v. McWilliams & Robinson (Ky. Ct. App.) 731.

3. If by agreement of the interested parties an application for an interlocutory injunction restraining the operation of a municipal ordinance is submitted for final judicial determination on the merits of the whole cause, and the bill is thereupon dismissed, the Supreme Court, in requiring further hearing upon the evidence will affirm a decree of the Circuit Court of Appeals reversing such dismissal, modifying it to permit a temporary injunction to operate pending the outcome of the proceeding. Hammond v. Farina Bus Line & Transp. Co. (U. S. Sup. Ct.) 382.

INSTALLATION CHARGE.
Application of installation charge by telephone company, see RATES, 30.

INSTRUMENTS.
Ownership of telephone instruments and payment of rental therefor, see SERVICE, 34.

INSURANCE.
Absence of necessity for filing liability insurance under Missouri Law in the case of motor carrier operating over irregular route, see AUTOMOBILES, 2.

INTANGIBLE PROPERTY.

Deduction of intangible allowances when making deduction for unused property, see VALUATION, 15.

INTERCORPORATE RELATIONS.

Proper questioning of witness in Commission investigation, see EVIDENCE, 2–6.

Withholding approval of rates pending investigation of evidence as to regularity of internal corporate relations, see RATES, 1.

Payment of percentage of gross revenues of water utility to parent company in lieu of salaries of general officers in recompense for engineering, accounting, and other services, see RETURN, 7.

INTEREST.

Interest on excess earnings recaptured from interstate railroad, see RETURN, 29.

INTEREXCHANGE SERVICE.

Business development from free interexchange telephone service, see RATES, 32.

Refusal of Commission to interfere with contract between connecting companies providing for free interexchange of messages, see RATES, 33.

General reduction of rates rather than free interexchange service as remedy for excessive return, see RETURN, 20.

INTERROGATORIES.

Burden of proof upon Commission to establish materiality of testimony sought to be elicited by interrogatories during investigation, see APPEAL AND REVIEW, 28.

INTERSTATE COMMERCE.

Jurisdiction to grant certificate without a showing of public convenience and necessity when interstate carrier is willing to comply with provisions of state law, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 6.

Prospect of interstate carrier service as not justifying issuance of certificate for intrastate business unless convenience and necessity is proven, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 35.

Evidence covering interstate demand for motor bus service as not to be considered where permission is asked to give intrastate service, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 41.

Section of Interstate Commerce Act providing for recapture of income from railroad as not invalid delegation of legislative power without prescribing method of procedure, see CONSTITUTIONAL LAW, 3.

1. Where the United States Supreme Court has decided that a certificate of the Interstate Commerce Commission must be a condition precedent to the validity of an order by a State Railroad Commission to erect an P.U.R.1928A.

INTERSTATE COMMERCE—*continued.*

interstate union station, and an ensuing certificate of approval from that body prescribes tentative limits for such construction, the State Commission in subsequent proceedings cannot vary the plans to the extent of approving "separate terminal" facilities under such certificate. Municipal League v. Southern P. Co. (Cal.) 152.

2. In the absence of contrary evidence, a State Railroad Commission, in proceedings supplemental to the issuance of a certificate of approval by the Interstate Commerce Commission for the erection of an interstate union terminal, may assume the comparative accuracy of the estimate of the Interstate Commerce Commission as to probable costs. Municipal League v. Southern P. Co. (Cal.) 152.

3. Acting under an original certificate from the Interstate Commerce Commission, the State Railroad Commission entered an order specifically conditioned upon the promulgation by the Interstate Commission of such further certificates and findings as might be necessary to authorize the construction, extensions, and abandonment incident to the establishment of an interstate union terminal, directed therein. Municipal League v. Southern P. Co. (Cal.) 152.

4. Current generated in a foreign state by a power utility whose only local equipment is of a stand-by character and delivered direct to the transmission lines of a distributing company is interstate commerce, and the State Commission has no jurisdiction to entertain proceedings regarding its regulations as to rates and service. Re Idaho Power Co. (Or.) 113.

5. Spur track construction extending from the end of an existing main line is not an extension of the main line within the purview of the spur track law giving the Interstate Commerce Commission (Par. 21, Interstate Commerce Act) jurisdiction over such construction and is, therefore, within the jurisdiction of the State Commission. Stange Lumber Co. v. Chicago, M. & St. P. R. Co. (Wis.) 721.

INTERSTATE COMMERCE COMMISSION.

Question whether Commission has erroneously decided that railroads under common control were operated as single system as judicially examinable by court in injunction proceeding against Commission order for recapture of earnings, see APPEAL AND REVIEW, 9.

Order of Interstate Commerce Commission directing payment of excess earnings into reserve fund as not denying use of railroad of what was its private property, see CONSTITUTIONAL LAW, 14.

Recapture of railroad earnings, see RETURN, 25–31.

INTERURBAN RAILWAYS.

Substitution of motor bus service for railway service, see SERVICE, 22–25.

INVESTIGATION.

Burden of proof upon Commission to establish materiality of testimony sought to be elicited by interrogatories during investigation, see APPEAL AND REVIEW, 28.

Matters relating to Commission investigations, see COMMISSIONS, 20–23.

IRREGULAR OPERATION.

Lack of Commission power to grant certificate for irregular operation, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 21–23.

Commission jurisdiction over motor carriers as not extending to carriers operating over irregular routes, not between fixed termini, see COMMISSIONS, 6.

IRREGULAR OPERATORS.

Absence of necessity for filing liability insurance under Missouri Law in the case of motor carrier operating over irregular route, see AUTOMOBILES, 2.

IRRIGATION.

Commission power to remove discrimination in irrigation rates by releasing old consumers who have defrayed pioneer expenses from burden of lien-bearing contract, see DISCRIMINATION, 6.

Rate of 5.28 per cent return on valuation of canal company as not confiscatory in view of complications in operating system and evidence tending to show rates in excess of value of service, see RETURN, 24.

Duty to serve as neither greater nor less by reason of contract for service where dedication of water has been made for lands by canal company, see SERVICE, 4.

JOINT USE.

Valuation of jointly used property regardless of question of title, see VALUATION, 16.

JURISDICTION.

Of Commissions over certificates of convenience and necessity, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 5–16.

Of Commissions generally, see COMMISSIONS, 1–19.

Of Commissions over crossings, see CROSSINGS, 8–14.

Of Commissions over discrimination, see DISCRIMINATION, 6, 7.

Of Commissions over monopoly and competition, see MONOPOLY AND COMPETITION, 1–4.

Of Commissions with respect to rates, see RATES, 3–7.

Of Commissions over service, see SERVICE, 3.

KILOWATT HOURS.

Construction of rate schedule upon kilowatt-per-month basis instead of room-rate schedule, see RATES, 20.

LABOR.

Lack of Commission jurisdiction over petition for order requiring flagman or conductor on all light engine movements on main track, see COMMISSIONS, 2.

LABOR—*continued.*

Unemployment as a factor affecting authorization of automobile service in competition with traction company, see MONOPOLY AND COMPETITION, 23.

1. The Commission has no control over the question of wage increases on a street railway. Re Georgia Power Co. (Ga.) 830.

2. A street railway company is justified in discharging a motorman for engaging in a brawl, followed by his arrest and conviction, by reason of which he missed his regular run, even though the brawl did not take place when he was on duty, especially when after a prior brawl he had been warned by the officials of the company that further misconduct would result in his dismissal. Rountree v. Indianapolis Street R. Co. (Ind.) 85.

LAND.

Land bought in advance of present needs as a factor in valuation, see VALUATION, 14.

Valuation of excess land of water utility, see VALUATION, 17.

LARGE USERS.

Discrimination in favor of large users, see DISCRIMINATION, 10.

LEASES.

Absence of duplicity in ordinance requiring village to lease electric plant, sell equipment, and grant franchise, see ORDINANCES, 1.

LEGAL QUESTIONS.

Commission jurisdiction over legal questions generally, see COMMISSIONS, 9–11.

LETTERS.

Exclusion of offer to show by oral testimony the contents of a letter, the absence of which was unaccounted for, see EVIDENCE, 8.

LIABILITY.

Power of Commission to limit liability for electric service, see COMMISSIONS, 1.

Statute of frauds as not a valid defense in negligence suit where contract is immaterial to liability, see CONTRACT, 1.

LIABILITY INSURANCE.

Absence of necessity for filing liability insurance under Missouri Law in the case of motor carrier operating over irregular route, see AUTOMOBILES, 2.

LICENSE TAX.

Lack of Commission jurisdiction over levying or collecting of license tax by motor bus operator, see COMMISSIONS, 5.

LIEN.

Invalidity of municipal ordinance requiring owner to pay delinquent bill for water furnished to tenant, see CONSTITUTIONAL LAW, 11.

LIMITATIONS.

Time limitation upon appeal from Commission order, see APPEAL AND REVIEW, 30.

Limitations in certificates of convenience and necessity, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 47–50.

Limitations on Commission powers, see COMMISSIONS, 16–19.

LIVERY SERVICE.

Necessity of certificate for operation of call and demand or auto livery service, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 25.

LOAD.

Lack of Commission jurisdiction to pass upon validity of ordinance limiting load of motor vehicles, see COMMISSIONS, 13.

LOCAL CONSENT.

Refusal of local authorities along route to grant motor bus operator right to use streets as not depriving Commission of right to grant certificate, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 9.

Commission as not compelled to wait upon the action of any city before granting a certificate, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 13.

LOCALITIES.

Discrimination between localities, see DISCRIMINATION, 7.

LONG DISTANCE SERVICE.

Telephone rates for long distance service, see RATES, 31–34.

LOSSES.

Loss of revenues by existing railroad carriers over territory included in proposed route of motor utility as not proof of lack of demand for service, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 38.

MAIL BOATS.

Necessity of certificate before operation of boats, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 17–19.

MAIN LINE.

Application for spur track extending from end of existing main line as not evasion of statutes requiring certificate as condition precedent to construction of extension of main line, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 4.

MAINTENANCE.

Construction of statute providing for maintenance of viaducts by railroads, see STATUTES, 1.

MANAGEMENT.

Commission jurisdiction over managerial questions, see COMMISSIONS, 12.

Power to question witness as to internal management of corporation, see EVIDENCE, 4.

Requirement that utility be allowed rates which, under reasonably prudent and economical management, will yield return sufficient to enable it to sell stock, see RETURN, 12.

MAPS.

Actual records or city map as basis for valuing main, see EVIDENCE, 1.

MASTER AND SERVANT.

Testimony as to what employees said were the duties of his employment as inadmissible against employer, see EVIDENCE, 10.

MEASURES OF VALUE.

See VALUATION, 6–11.

MERGER.

See CONSOLIDATION, MERGER, AND SALE.

METALLIC LINES.

Change from grounded lines to metallic lines as affecting operating expenses, see RETURN, 10.

Approval of program to metallicize grounded lines, see SERVICE, 35.

METER DEPOSIT.

Deposit to insure payment, see PAYMENT, 2.

METERS.

Proper minimum charge for each customer as dependent upon size of meter, see RATES, 17.

Discontinuance of service because of tampering with meter to divert electric current, see SERVICE, 13.

MINIMUM CHARGE.

Minimum charges, see RATES, 15–17.

Dismissal of petition for increase of monthly minimum charge signed by most of consumers in view of expense of hearing required by law, see RATES, 19.

MODIFICATION.

Grounds for reversal or modification, see APPEAL AND REVIEW, 24–26.

MONOPOLY AND COMPETITION.

I. Jurisdiction and powers of Commissions, 1–4.
II. Bridge companies, 5, 6.
III. Telephone companies, 7–10.
IV. Transportation companies, 11–27.
V. Rate cutting, 28, 29.
VI. Restrictions on competition, 30–34.

I. Jurisdiction and powers of Commissions.

Reacquirement of rights surrendered under anticompetition agreement as not justified without Commission approval, see infra, 8.

Commission power to determine validity of ordinance prohibiting automobiles from stopping to receive or discharge passengers on streets where there are street cars, see COMMISSIONS, 14.

1. The Colorado Commission has jurisdiction under § 35 (a) to determine the questions raised by a complaint against an alleged invasion of territory by an electric utility and, if the facts should warrant, to grant relief. Clear Creek Power & Develop. Co. v. Public Service Commission (Colo.) 506.

2. The Commission is not prevented from issuing a certificate of convenience and necessity to a bus utility by reason of the fact that a rail service exists, because of a statutory provision requiring the Commission "to give reasonable consideration to the transportation service being furnished by any railroad, street railway, etc." (§ 4, Missouri Laws 1927). Re Purple Swan Safety Coach Lines (Mo.) 193.

3. In a state where the legislative policy is to protect competition of utilities, whether either competing company has been guilty of unfair practices as regards the other utility, is not a question for the determination of the Commission. Farmers Teleph. Co. v. Wisconsin Teleph. Co. (Wis.) 486.

4. Competitive rate cutting by a telephone company which will be able adequately to serve the community at a loss, and which charges the resulting losses to amount available for return and not to operating expenses, does not present a situation which jeopardizes the telephone service of the community other than the competitive condition which the Commission is powerless to eliminate. Farmers Teleph. Co. v. Wisconsin Teleph. Co. (Wis.) 486.

II. Bridge companies.

State regulation of toll rates as not giving utility exclusive right to maintain its bridges, see RATES, 2.

5. The legislative distinction between toll bridges and other public utilities, in refusing to the former monopolistic protection granted to the others, is grounded in the intention that the state should not be hampered in is governmental function of providing the public with highways and incidental bridges, and that it should not be obliged to go to the Railroad Commission or any other body for permission to exercise that function. Muscoda Bridge Co. v. Muscoda (Wis. Sup. Ct.) 146.

6. A toll bridge utility operating under an alleged indeterminate per-

MONOPOLY AND COMPETITION—*continued.*
mit is not protected from competition by a law (§ 196.50—Stat. 1925) expressly limiting such protection to heat, light, water, power, and telephone utilities. Muscoda Bridge Co. v. Muscoda (Wis. Sup. Ct.) 146.

III. Telephone companies.

Commission jurisdiction over competition by telephone company, see supra, 3, 4.

Effect of utility's refusal of suggestion as to economies to avoid re-entry into area, creating burdens of duplication of service, see COMMISSIONS, 12.

7. The re-establishment of a telephone office and a resumption of service was found to be contrary to public necessity where the telephone company had voluntarily abandoned its rights to maintain a central office in a community adequately served by another utility, and a discontinuance of such service was ordered. Tioga County Bell Teleph. Co. v. Citizens' Mut. Teleph. & Teleg. Co. (Pa.) 712.

8. Acts in abandonment of service by a telephone utility in a certain area in conformity with an anticompetition agreement and a gradual withdrawal of facilities in accordance therewith is a surrender of its rights to render service which cannot be reacquired without the approval of the Commission. Tioga County Bell Teleph. Co. v. Citizens' Mut. Teleph. & Teleg. Co. (Pa.) 712.

9. An anticompetition agreement between two telephone companies apportioning territory for respective operation of service, although lacking legal formalities and possibly unenforceable between the parties, has evidential value for the Commission as showing the abandonment of certain rights in the specified areas by the respective utilities. Tioga County Bell Teleph. Co. v. Citizens' Mut. Teleph. & Teleg. Co. (Pa.) 712.

10. A telephone company may be permitted to extend service to a new residence of a subscriber to whom it rendered service at his former residence on the same farm, which has since been divided, although it appears that a line from another company is nearer, if his family, business, church and social connections are almost exclusively in the territory served by the first company, even though the nearest railroad station, his bank, and the place of transaction of some other business is in the territory of the second company. Re Bergen Teleph. Co. (Wis.) 129.

IV. Transportation companies.

Commission as not prevented from issuing certificate to bus utility by reason of fact that rail service exists, see supra, 2.

Reversal of award by Commissioner of certificate for bus operation over route already served under erroneous impression that it was his duty to grant the same on a finding of public convenience regardless of necessity, see APPEAL AND REVIEW, 26.

Loss of revenues by existing railroad carriers over territory included in proposed route of motor utility as not proof of lack of demand for service, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 38.

MONOPOLY AND COMPETITION—*continued.*

Excusing failure to observe restrictions of certificate where law unsettled and unauthorized service was begun on account of competition by unauthorized carriers, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 51.

11. Clear proof that existing service is inadequate or unsatisfactory is necessary to warrant the grant of a certificate to operate a transportation utility over a route virtually paralleling established lines. Re Townsend (Colo.) 175.

12. A certificate to operate a motor utility should not be granted where the additional transportation proposed would result in the curtailment or destruction of other forms of transportation vital to the needs of the people. Re Townsend (Colo.) 175.

13. Guaranty of cheaper fare, while entitled to great weight is not alone sufficient to overcome the consideration of destructive competition to vital existing utilities likely to result from the grant of a certificate. Re Townsend (Colo.) 175.

14. Lack of complaints against an existing utility is reason for concluding the absence of public convenience and necessity for additional operation over the same territory. Re Giacomelli Brothers (Colo.) 425.

15. An applicant for a certificate of convenience and necessity cannot complain of the inadequate service of the holder of a certificate operating over the proposed route, where such defects in service have been caused by the ruinous and illegal competition of the applicant. Re Giacomelli Brothers (Colo.) 425.

16. A certificate of public convenience was granted to a motor transportation utility upon evidence that railroad service between different points along the proposed route was inadequate and insufficient both as to frequency and as to mode of transportation to meet the demands of a population recently accumulated along hard surfaced highways and that existing railroad service was of interstate character and beyond the jurisdiction of the Commission to impose local schedules, and that such railroads had not voluntarily offered to revise schedules to meet the demand but claimed to be operating at a loss between these points. Re Egyptian Transp. System (Ill.) 43.

17. Although temporary rerouteing of a coach company is permitted by the Commission because of street repairs, if upon hearing to make the new route permanent, it appears that present traction service is inadequate to take care of public convenience, that additional traction service is impossible because of traffic conditions, that present traction service could suffer no loss of patronage, and that coach service increases density of traffic but 2.3 per cent in certain sections while passenger capacity is increased 65.9 per cent—and serves its passengers in a satisfactory manner, the Commission in view of such efficiency will make permanent rerouteing although it may coincide at some points with traction routes. Re Chicago Motor Coach Co. (Ill.) 564.

18. A certificate of convenience and necessity should be denied if the operation of the applicant would have such effect on other carriers, rail and motor, as to be detrimental to the interest of the public, giving due P.U.R.1928A.

MONOPOLY AND COMPETITION—*continued.*
consideration to the entire transportation situation in the territory affected. Re Purple Swan Safety Coach Lines (Mo.) 193.

19. Lacking figures to show the relative proportion of lost railroad patronage due to private automobiles in comparison with motor busses, the Commission recognized the impossibility of a return to conditions existing before the advent of roads, automobiles, and busses, and dealt with the competitive situation between railroads and busses as a permanent one. Re Purple Swan Safety Coach Lines (Mo.) 193.

20. A certificate of convenience was granted to a motor utility notwithstanding alleged competition to existing railroads in view of the major portion of proven loss of patronage to these carriers during recent years being due to private automobiles rather than those operated for hire. Re YellowaY (Mo.) 217.

21. A certificate of convenience and necessity to operate through bus service without a right of pick-up over territory already adequately served by existing carriers, is properly granted where, in view of the character of service rendered by existing transportation utilities in the territory as a whole, no other through route would be as convenient for public needs. Ohio Valley Transit Co. v. Public Utilities Commission (Ohio Sup. Ct.) 404.

22. A certificate should not be granted to a motor truck operator whose former certificate has lapsed for some time, authorizing him to engage in a general or unrestricted common carrier business in a field where established carriers, rail and auto truck, are furnishing adequate service to the public, since the public interest would not be served by the establishment of a service that would be destructively competitive. Re Guerin (Pa.) 709.

23. The Commission considered the unemployment of professional traction crews which might result from competition by automobiles as a ground for refusing a certificate to a motor carrier over the route of an existing utility. Re Labelle (R. I.) 474.

24. Where an existing utility is maintaining an ample and sufficient service to meet all traveling requirements, public convenience and necessity cannot be involved and no permit to compete with such service will be issued. Re Labelle (R. I.) 474.

25. The fact that an applicant for a certificate of convenience and necessity to operate a motor carrier service in competition with existing carriers has been maintaining better service without authority over the same route is no proof of the inadequacy of the existing service, and authority should be denied when the holders of certificates can amend their schedules and improve their service in such a manner as to take care of the business. Re Powell (S. D.) 475.

26. The inauguration of a pick-up-and-delivery service by an electric railway should not be disapproved because such service is being rendered by a motor transportation utility. Re Bamberger Electric R. Co. (Utah) 116.

27. Authority to operate an intrastate motor bus service should be denied when the train service along the proposed route is sufficient. Re Columbia Gorge Motor Coach System (Wash.) 119.

MONOPOLY AND COMPETITION—*continued.*

V. Rate cutting.

Commission power to eliminate rate cutting, see **supra, 4.**

Guaranty of cheaper fare as factor affecting authorization **of motor bus** competition, see supra, 13.

28. All patrons of motor busses are entitled to the same rate of fare between given points and the Commission will expect applicants for certificates to refrain from competitive rate cutting or unauthorized schedule variation. Re Purple Swan Safety Coach Lines (Mo.) 193.

29. The Commission will not tolerate reckless and unsound rate-cutting between motor carriers for the purpose of destroying each other at the expense of exhaustion of utility assets for which the public must eventually suffer. Re YellowaY (Mo.) 217.

VI. Restrictions on competition.

Modification of Commission order granting overlapping certificates so as to limit operation of each carrier to specific territory, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 49.

30. If a portion of the proposed route of a motor transportation utility be found to coincide with an existing railroad utility rendering adequate and satisfactory service between such points, the Commission will restrict the motor utility from carrying on local service to the extent that the routes so coincide. Re Egyptian Transp. System (Ill.) 43.

31. A motor bus company operating between points served by other carriers should so stagger and arrange its schedule as to avoid duplication of service, and to render the operation of motor transportation companies over the same route safe and the service offered convenient. Re Cotner Bus Line (Neb.) 686.

32. An agreement between a city and a railroad, which has dedicated land for an adjacent street, not to permit carrier operations of any mode by anyone upon a certain highway without first offering the railroad the exclusive right to furnish the same on equal terms, is not a proper restriction against competition but rather a hindrance to the determination of the use of the street for transportation purposes from the standpoint of public necessity. Re West Jersey & Seashore R. Co. (N. J.) 696.

33. An agreement by a city with a railroad not to allow future operation of any railway or motor vehicle used as a common carrier on a street, part of the land for which is thereupon dedicated by the railroad, is a reasonable and proper restriction against competition. Re West Jersey & Seashore R. Co. (N. J.) 696.

34. A certificate of convenience and necessity is properly granted to operate a motor bus over a route already being covered by the holder of a prior certificate where the Commission has restricted the subsequent applicants from rendering local service within the territory covered by the certificate holder. Lykins v. Public Utilities Commission (Ohio Sup. Ct.) 396.

MOOT QUESTION.

Refusal of Commission to decide moot question, see CONSOLIDATION, MERGER AND SALE, 2.

MOTORMEN.

Right of street railway company to discharge motorman for engaging in brawl, see LABOR, 2.

MUNICIPALITIES.

Question of validity of municipal ordinance as not to be passed upon by Supreme Court of United States without aid of discussions by members of lower courts familiar with local law, see APPEAL AND REVIEW, 3.

Refusal of local authorities along route to grant motor bus operator right to use streets as not depriving Commission of right to grant certificate, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 9.

Necessity for operation of motor carrier service whose route is largely between different cities as strictly a matter for determination of Commission notwithstanding law giving city power to supervise rates and service, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 10.

Lack of Commission jurisdiction over motor vehicles operated wholly within limits of a city, or where major part of system is within such limits, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 11.

Commission as not compelled to wait upon the action of any city before granting a certificate, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 13.

Formal refusal of municipality along proposed bus route as not necessary to give Board discretion to act on application, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 14.

Powers in relation to certificates of convenience and necessity, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 27–29.

Commission as not to take judicial notice of city ordinance, see COMMISSIONS, 8.

Lack of Commission jurisdiction to enforce provisions of ordinance requiring traction company to make repairs to pavement, see COMMISSIONS, 11.

Ordinances as not operating to nullify Commission law imposing upon the Commission the duty to regulate rates and supervise service, see COMMISSIONS, 18.

Absence of occasion for considering whether ordinance violates Federal Constitution if it is void under state law, see CONSTITUTIONAL LAW, 1.

Ordinance assuming to protect public health but clearly designed to enforce collection of water rents under guise of police regulation, see CONSTITUTIONAL LAW, 6–8.

Free service to municipality as unlawful, see DISCRIMINATION, 9.

Ordinance provision that purchaser of village electric utility shall furnish current to certain amount free of charge for ten-year period as not unlawfully discriminatory, see DISCRIMINATION, 12.

Objection relating to possible interference with municipal acquisition as not material on application for authority to issue securities for refunding, see SECURITY ISSUES, 9.

MUNICIPALITIES—*continued.*

1. An unexplained and irrelevant clause confirming the right of a railroad to operate and maintain its lines within a city, in a contract between these two parties, will be stricken out as surplusage because of the possibility of an inadvertent waiver of rights by the city. Re West Jersey & Seashore R. Co. (N. J.) 696.

MUNICIPAL PLANTS.

Defect in neighboring ordinance as cured by contract clause, see CONSOLIDATION, MERGER, AND SALE, 3.

Ordinance provision that purchaser of village electric utility shall furnish current to certain amount free of charge for ten-year period as not unlawfully discriminatory, see DISCRIMINATION, 12.

Absence of duplicity in ordinance requiring village to lease electric plant, sell equipment, and grant franchise, see ORDINANCES, 1.

1. Courts will not disturb the judgment of a municipal board acting in its sound discretion, in deciding to sell a city electric plant, unless evidence shows discretionary abuse, fraud or collusion. Stone v. Osborn (Ohio Ct. App.) 25.

2. A contract for the sale of a municipal electric utility to a former municipal trustee, who had resigned shortly before in order to make his bid therefor, is valid and binding, since his subsequent purchase is not in violation of an act (General Codes, § 12910) penalizing public officers financially interested in municipal contracts. Stone v. Osborn (Ohio Ct. App.) 25.

3. A contract for the sale of a municipal utility to a former municipal trustee, who had resigned two days before the proposed sale to make his bid therefor, is valid and binding, since his action is not in violation of an act (General Code, § 12912) punishing municipal officers "interested . . . in the profits of any contract" with the corporation or acting as "commissioner, architect, superintendent or engineer in any work undertaken by the corporation" for one year after their term. Stone v. Osborn (Ohio Ct. App.) 25.

4. The ordinance of a municipality engaged in furnishing water prescribing regulations for the same, has no greater force than the by-law of a private corporation enfranchised to do business of a like character, since both stand on the same footing and have exactly the same right to make and enforce reasonable rules and regulations. Etheredge v. Norfolk (Va. Sp. Ct. App.) 409.

MUTUAL COMPANIES.

Former mutual telephone company which presently serves 200 or more subscribers not stockholders as a public utility, see PUBLIC UTILITIES, 3.

NECESSITY.

See also CERTIFICATES OF CONVENIENCE AND NECESSITY.

P.U.R.1928A.

NECESSITY—*continued.*

Reversal of award by Commissioner of certificate for bus operation over route already served, under erroneous impression that it was his duty to grant the same on a finding of public convenience regardless of necessity, see APPEAL AND REVIEW, 26.

NEGLIGENCE.

Statute of frauds as not a valid defense in negligence suit where contract is immaterial to liability, see CONTRACT, 1.

NET RATES.

Gross and net telephone rates, see PAYMENT, 1.

NEW YORK.

Interrogatory powers of Commission in conducting transit investigations, see COMMISSIONS, 21–23.

Supreme Court as not at liberty to disregard ruling of court of appeals and to adopt views of dissenting judges, see COURTS, 1.

NOTICE.

Notice to Commission as to terms or circumstances of equipment purchase before it permits withdrawal of utility funds for the purchase, see SECURITY ISSUES, 1, 2.

OFFICERS.

Power of Commission to inquire into personal conduct of officers of corporation, see COMMISSIONS, 22.

Sale of municipal plant to former city officer, see MUNICIPAL PLANTS, 2, 3.

Payment of percentage of gross revenues of water utility to parent company in lieu of salaries of general officers in recompense for engineering, accounting, and other services, see RETURN, 7.

Limitation on compensation of officer of telephone utility, see RETURN, 8.

OFF-PEAK SERVICE.

Electric rates for refrigerator service, see RATES, 18.

OPERATING EXPENSES.

Operating expenses and other deductions from gross revenues, see RETURN, 3–10.

OPERATION IN GOOD FAITH.

Operation in good faith prior to regulation as affecting granting of certificate, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 30, 31.

ORDERS.

Court after hearing appeal from Commission rate order as required to enter final decree instead of directing Commission to enter final order or decree upon its record, see APPEAL AND REVIEW, 29.

Amendment of Commission order erroneously dated to conform to facts, see APPEAL AND REVIEW, 31.

Inadvertent admission of immaterial testimony recognized as such by chairman of Commission, and discarded from consideration in formulating order, as not invalidating the order, see PROCEDURE, 4.

Temporary Commission order to test accuracy and reasonableness of proposed telephone rates as subject to review by court, see RATES, 39.

Expiration of order under review, see RATES, 41.

ORDINANCES.

Question of validity of municipal ordinance as not to be passed upon by Supreme Court of United States without aid of discussions by members of lower courts familiar with local law, see APPEAL AND REVIEW, 3.

Issuance of preliminary order providing that certificate will be granted after applicant has obtained municipal franchise, permit, ordinance, or other authority, see CERTIFICATE OF CONVENIENCE AND NECESSITY, 27.

Commission as not to take judicial notice of city ordinance, see COMMISSIONS, 8.

Lack of Commission jurisdiction to enforce provisions of ordinance requiring traction company to make repairs to pavement, see COMMISSIONS, 11.

Commission jurisdiction over validity of ordinances, see COMMISSIONS, 13, 14.

Ordinances as not operating to nullify Commission law imposing upon the Commission the duty to regulate rates and supervise service, see COMMISSIONS, 18.

Defect in ordinance as cured by contract clause, see CONSOLIDATION, MERGER, AND SALE, 3.

Absence of occasion for considering whether ordinance violates Federal Constitution if it is void under state law, see CONSTITUTIONAL LAW, 1.

Ordinance assuming to protect public health but clearly designed to enforce collection of water rents under guise of police regulation, see CONSTITUTIONAL LAW, 6–8.

Ordinance provision that purchaser of village electric utility shall furnish current to certain amount free of charge for ten-year period as not unlawfully discriminatory, see DISCRIMINATION, 12.

Temporary injunction to operate pending outcome of proceeding, see INJUNCTION, 3.

Ordinance of municipality engaged in furnishing water prescribing rules and regulations for the same as having no greater force than by-law of private corporation, see MUNICIPAL PLANTS, 4.

ORDINANCES—*continued.*

1. There is no duplicity in an ordinance requiring a village to lease its electrical plant, sell its equipment, and grant a franchise, these three elements all being necessary to carry out a single object,—the sale of the village electrical utility—and, therefore, not a violation of a statute (§ 4226, General Code) forbidding ordinances containing more than one subject. Stone v. Osborn (Ohio Ct. App.) 25.

ORIGINAL COST.

Function of depreciation reserve to return original cost and not reproduction cost, see DEPRECIATION, 2.

Refusal to make finding of value based solely upon cost in view of increased values since construction, see VALUATION, 10.

OVERLAPPING CERTIFICATES.

Modification of Commission order granting overlapping certificates so as to limit operation of each carrier to specific territory, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 49.

PACKAGE DELIVERY.

Company delivering packages for department stores under contract as not engaged in business of common carrier, see PUBLIC UTILITIES, 6.

PARENT COMPANIES.

Payment of percentage of gross revenues of water utility to parent company in lieu of salaries of general officers in recompense for engineering, accounting, and other services, see RETURN, 7.

PARTIES.

1. Authority to transfer a certificate of convenience and necessity should not be denied because two copartners did not join in the application, if the original application was signed with the firm name and at the hearing it is shown that the other partners join in and request the order of approval. Re Kidd (Colo.) 771.

PARTNERSHIP.

Denial of right of various individuals to operate motor trucks separately and without any sort of financial connection, under one permit or certificate, and upon payment of but one statutory fee, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 57.

Denial of authority to transfer certificate of convenience and necessity when copartners did not join in application, see PARTIES, 1.

Arrangement by which separate motor truck operators conduct business over separate routes, each one paying his own expenses and retaining earnings as not possessing elements of partnership, see PUBLIC UTILITIES, 16.

PASSENGER SERVICE.

Return as a whole with respect to right to discontinue unprofitable service, see SERVICE, 11.

Passenger train service, see SERVICE, 28–30.

PAVING.

Lack of Commission jurisdiction to enforce provisions of ordinance requiring traction company to make repairs to pavement, see COMMISSIONS, 11.

Charges to operating expenses of street railway for street paving costs and gross receipts tax, see RETURN, 5.

Authorization of abandonment of street railway service along streets about to be resurfaced or repaved, see SERVICE, 15.

Damage to highway by automobiles as affecting right to curtail passenger train service and substitute motor busses, see SERVICE, 22.

Paving by street railways, see STREET RAILWAYS, 1–3.

PAYMENT.

Ordinance assuming to protect public health but clearly designed to enforce collection of water rents under guise of police regulation, see CONSTITUTIONAL LAW, 6–8.

Invalidity of municipal ordinance requiring owner to pay delinquent bill for water furnished to tenant, see CONSTITUTIONAL LAW, 11.

Relation of working capital to operating expenses, revenues, and collection periods, see VALUATION, 22.

Annotation on deposits and guaranties, p. 588.

Annotation on discounts and penalties to secure prompt payment, p. 588.

Annotation on metering, billing, and time of payment, p. 588.

Annotation on refusal of service to enforce payment, p. 589.

1. A telephone company should be permitted to establish gross rates 25 cents in excess of the net rates, the net rate applying when payment is made on or before the 10th of the current month billed, and in case of rural subscribers if payment is made during the first month of the quarter billed. Re Interstate Teleph. Co. (Neb.) 587.

2. A water company continuing service to a consumer pending the settlement of a dispute over a bill for past services may require, if necessary, a reasonable deposit to secure the payment of future bills. Bellanca v. Middlesex Water Co. (N. J.) 591.

3. Service should not be discontinued to a patron who refuses to pay a disputed bill for past services when his financial responsibility and honesty are conceded and there is an honest dispute as to the amount owed, especially when the consumer has tendered payment for a subsequent bill. Bellanca v. Middlesex Water Co. (N. J.) 591.

4. The fact that the majority of the consumers of an electrical utility own their own meters raises a question as to the propriety of a meter deposit. Re Hughes Electric Co. (N. D.) 601.

5. The fact that a meter deposit is in effect in numerous places in a

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PAYMENT—*continued.*
state is not conclusive as to its necessity or reasonableness in all cases. Re Hughes Electric Co. (N. D.) 601.

6. The burden of justifying a meter deposit is upon the utility proposing such a charge where a protest is made. Re Hughes Electric Co. (N. D.) 601.

7. A telephone company may require of customers subscribing for service for whom it is not necessary to install an instrument, a deposit to guarantee collection of bills and to hold such deposit or any portion of it not required to be applicable to delinquent accounts for a period of two years. Re Westby Teleph. Co. (Wis.) 610.

PAY STATIONS.

Telephone rate for pay station, see RATES, 29.

PERMITS.

Grant of certificate to one of two applicants who possesses permit or authorization from Secretary of War to transport passengers in and upon grounds of Federal hospital, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 43.

PERSONAL MATTERS.

Power of Commission to inquire into personal conduct of officers and corporation, see COMMISSIONS, 22.

PERSONAL RIGHT.

Personal and property rights under constitution, see CONSTITUTIONAL LAW, 9–16.

PHYSICAL CONNECTION.

Refusal of Commission to interfere with contract between connecting companies providing for free interexchange of messages, see RATES, 33.

PICK-UP-AND-DELIVERY SERVICE.

Inauguration of pick-up-and-delivery service by electric railway notwithstanding service rendered by motor transportation utility, see MONOPOLY AND COMPETITION, 26.

PLUMBING.

Application of minimum water charge to each tenant in the absence of arrangement of pipe and separate meter to permit separate services, see RATES, 15.

POLICE POWER.

See CONSTITUTIONAL LAW, 4–8.

POPULATION.

Value of telephone service to subscriber as affected by size of exchange, number of subscribers, business and resident, density of population, size, character, saturation, and economic condition of territory served and nature of use made of service, see RATES, 9.

POWER.

Charge to railway department of combined utility for electricity supplied by electric department, see RETURN, 4.

POWERS.

Of Commissions over certificates of convenience and necessity, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 5–16.

Of municipalities with respect to certificates of convenience and necessity, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 27–29.

Of Commissions generally, see COMMISSIONS, 1–19.

Of Commissions over crossings, see CROSSINGS, 8–14.

Of Commissions over discrimination, see DISCRIMINATION, 6, 7.

Of Commissions over monopoly and competition, see MONOPOLY AND COMPETITION, 1–4.

Of state over rates, see RATES, 2.

Of Commissions with respect to rates, see RATES, 3–7.

Of Commissions over reparation, see REPARATION.

Of Commissions over service, see SERVICE, 3.

PRESSURE.

Rate differential when water must be pumped twice to attain sufficient pressure, see RATES, 35.

PRESUMPTIONS.

Presumption as to reasonableness of Commission findings, see APPEAL AND REVIEW, 14–23.

Presumption that motor bus service rendered in good faith prior to regulation act was necessary to public convenience, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 30, 31.

PRICES.

Refusal to make finding of value based solely upon cost in view of increased values since construction, see VALUATION, 10.

PRIORITY.

Prior operation as a ground for preference in granting certificate of convenience and necessity, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 45.

PRIVATE CARRIERS.

Lack of Commission jurisdiction to restrain private motor carrier service without a certificate, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 5.

PROCEDURE.

Procedure on appeal, see APPEAL AND REVIEW, 27–31.

Procedure on applying for certificate, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 55–57.

Annotation on procedure, p. 543.

Annotation on scope of proceedings, p. 544.

1. The Commission, in a proceeding commenced by filing a complaint against an electric utility alleged to be invading the territory of another company, may determine a question raised by the answer for alternative relief, namely, whether in the event the defendant is not entitled to operate in the vicinity, a certificate of public convenience and necessity should be issued to it authorizing such operation. Clear Creek Power & Develop. Co. v. Public Service Commission (Colo.) 506.

2. Leave to file a second application for rehearing of a case in which an order has been issued by the Commission should not be granted because the parties have been misadvised as to legal procedure when no new grounds are stated. Pikes Peak Consol. Fuel Co. v. Denver & R. G. W. R. Co. (Colo.) 768.

3. The informal docket of the Michigan Commission is informal only in respect to the form of pleadings and the character of the hearing. Cadillac-Soo Lumber Co. v. Duluth, S. S. & A. R. Co. (Mich.) 539.

4. Inadvertent admission of immaterial testimony, recognized as such by the chairman of the Commission, and discarded from consideration in formulating an ensuing order, does not invalidate the same. Norfolk & W. R. Co. v. Com. ex rel. State Corp. Commission (Va. Ct. App.) 397.

PROPERTY NOT USED.

Valuation of property not used or useful, see VALUATION, 14–20.

PROPERTY OWNERS.

Inconvenience of individual property owners as not affecting determination by Commission of whether necessities and convenience of general public requires motor bus transportation, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 33.

Invalidity of municipal ordinance requiring owner to pay delinquent bill for water furnished to tenant, see CONSTITUTIONAL LAW, 11.

PROPERTY RIGHTS.

Personal and property rights under constitution, see CONSTITUTIONAL LAW, 9–16.

PROTECTION.

Protection at crossings, see CROSSINGS.

PUBLIC HEALTH.

Ordinance assuming to protect public health but clearly designed to enforce collection of water rents under guise of police regulation, see CONSTITUTIONAL LAW, 6–8.

PUBLIC INTEREST.

Inconvenience of individual property owners as not affecting determination by Commission of whether necessities and convenience of general public requires motor bus transportation, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 33.

PUBLIC UTILITIES.

I. In general, 1–5.
II. What constitutes a public utility, 6–16.

I. In general.

Duty of grain elevator and electric company to keep proper accounts distinguishing operations, see ACCOUNTING, 2.

Invalidity of Commission rule providing that no statement of utility employee shall bind company unless in writing and approved by official thereof, see COMMISSIONS, 9.

Power of Commission to inquire into personal conduct of officers and corporation, see COMMISSIONS, 22.

Power to question witness as to internal management of corporation, see EVIDENCE, 4.

State regulation of toll rates as not giving utility exclusive right to maintain its bridges, see RATES, 2.

Annotation on corporate procedure, p. 245.

1. A corporation may or may not engage in public service, and until it does it is not subject to the jurisdiction of the Public Utilities Commission. Codd v. McGoldrick Lumber Co. (Idaho) 545.

2. The Commission must determine its jurisdiction over a logging railroad on evidence bearing upon the service which the railroad has rendered, or is rendering, to the public, and not upon the fact of its existence as a railroad, and the same principle applies to the terms "railroad corporation," "common carrier," and "public utility." Codd v. McGoldrick Lumber Co. (Idaho) 545.

3. A former mutual telephone company which presently serves 200 or more subscribers not stockholders was declared to be a public utility subject to Commission regulation. Re Industry Teleph. Co. (Ill.) 435.

4. Public service corporations and all stockholders therein must give full and frank information as to their holdings in each other, and questions of an investigating Commission properly framed with this purpose are material. Gilchrist v. Dahl (N. Y. Sup. Ct. Sp. T.) 336.

5. No operator in the transportation field can divest himself of his responsibilities to the larger public merely by stipulation, formal or informal, with a part of the community. Lehigh Valley Transit Co. v. Erb (Pa.) 606.

II. What constitutes a public utility.

Commission jurisdiction over motor carriers as not extending to carriers operating over irregular routes, not between fixed termini, see COMMISSIONS, 6.

PUBLIC UTILITIES—*continued.*
Commission jurisdiction in determining status of railroad as a common carrier, see COMMISSIONS, 10.

Annotation on what constitutes a public utility, p. 243.
Annotation on tests of public utility status, p. 244.
Annotation on character of company as affecting public utility status, p. 245.
Annotation on what constitutes public service, p. 245.

6. A company delivering packages for department stores under special contract is not engaged in the business of a common carrier. Anderson v. United Parcel Service (Cal.) 265.

7. An employment agency operating automobiles to transport laborers between fixed termini for compensation received from the companies thus accommodated is a public carrier subject to Commission regulation. California Transit Co. v. Scott (Cal.) 385.

8. Motor operators holding themselves out to the public at all hours to transport any and all persons between fixed stations are common carriers and susceptible to regulation prescribed for the same. Re Giacomelli Brothers (Colo.) 425.

9. The question of whether one is a common carrier or not is not determined in any manner by what he calls himself. Re Giacomelli Brothers (Colo.) 425.

10. Operation on regular time schedule is not necessary to invest motor car operations with the status of common carrier. Re Giacomelli Brothers (Colo.) 425.

11. A lumber company owning and operating a logging railroad exclusively for hauling its own products is neither a railroad corporation, a common carrier, nor a public utility, as defined by the statutes governing the powers and duties of the Idaho Commission. Codd v. McGoldrick Lumber Co. (Idaho) 545.

12. Rapid transit utilities organized as "railroads" and not as "electrical" corporations for the purpose of doing a railroad business, which sell some of their surplus power chiefly to various street railway companies and their receivers are not "electrical corporations," nor, as such, subject to the jurisdiction of the Commission within the meaning of the Public Service Commission Law (§ 2, Subdiv. 13). Re Chalmers (N. Y.) 332.

13. A private motor carrier operating over the public highways of the state, though without regular or fixed time schedules, between fixed points in the transportation of commodities for hire under separate contracts with several principal business concerns located and doing business in one of such points, is a "motor carrier," within the meaning of Chap. 113, S. L. 1923, and is subject to control and regulation by the provisions of law therein provided. Barbour v. Walker (Okla. Sup. Ct.) 623.

14. The test of public utility status is not met by limitations as to the extent of the public that will be served. Lehigh Valley Transit Co. v. Erb (Pa.) 606.

15. A motor transportation business operated between specified points for a regular and unsolicited clientele upon informal agreements terminable

PUBLIC UTILITIES—*continued.*
upon notice by either party, is common carriage subject to Commission jurisdiction. Lehigh Valley Transit Co. v. Erb (Pa.) 606.

16. An arrangement by which separate motor truck operators conduct business over separate routes, each one paying his own operating expenses and retaining all of the earnings of his own equipment, and keeping his own accounts, there being no common or partnership property, no common fund, and no sharing, either equally or proportionately, of earnings or expenses, possesses no elements of a partnership or other association which might be recognized as a legal entity, although an office equipped with a telephone is maintained in common. Re Greyhound Co. (S. D.) 239.

PUMPS.

Rate differential when water must be pumped twice to attain sufficient pressure, see RATES, 35.

Sum donated by assessed consumers to contribute to construction at peak prices of emergency pumping station as a factor in valuation, see VALUATION, 13.

PUPILS.

Cash and ticket fares on street railway with reduced rate for school children, see RATES, 24.

Fares for school children with plan for tickets, tokens, and sale of books, see RATES, 26.

Modification of proposed increase of fares for pupils, see RATES, 27.

PURCHASE PRICE.

Amortization of excessive purchase price, see ACCOUNTING, 1.

RAILROADS.

Order requiring new station based on petition that present passenger station is inadequate for passenger or freight service, as necessarily involving both kinds of service, see APPEAL AND REVIEW, 5.

Order changing layout of track as incident to improvement of station facilities, see APPEAL AND REVIEW, 6.

Question whether Commission has erroneously decided that railroads under common control were operated as single system as judicially examinable by court, see APPEAL AND REVIEW, 9.

Commission order for extension of railroad siding as not disturbed by court because of claim that extension is not workable on account of grades, where there is evidence reasonably supporting finding that extension is workable, see APPEAL AND REVIEW, 15.

Apportionment of revenues between stations, see APPORTIONMENT, 1.

Application for spur track extending from end of existing main line as not evasion of statutes requiring certificate as condition precedent to construction of extension of main line, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 4.

RAILROADS—*continued.*

Loss of revenues by existing railroad carriers over territory included in proposed route of motor utility as not proof of lack of demand for service, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 38.

Lack of Commission jurisdiction over petition for order requiring flagman or conductor on all light engine movements on main track, see COMMISSIONS, 2.

Commission jurisdiction in determining status of railroad as a common carrier, see COMMISSIONS, 10.

Commission jurisdiction to entertain petition to restrain railroad from substituted inferior accommodation at agency station, see COMMISSIONS, 15.

Section of Interstate Commerce Act providing for recapture of income from railroad as not invalid delegation of legislative power without prescribing method of procedure, see CONSTITUTIONAL LAW, 3.

Constitutionality of order requiring railroad company to erect new station, see CONSTITUTIONAL LAW, 10.

Order of Interstate Commerce Commission directing payment of excess earnings into reserve fund as not denying use of railroad of what was its private property, see CONSTITUTIONAL LAW, 14.

Suit against Commission under law giving body discretion in regulating viaduct structures as not subject to operation of later law making it mandatory unless found impracticable by the Commission that all viaducts should be at least 22 feet above track, see CONSTITUTIONAL LAW, 17, 18.

Crossings of railroad, see CROSSINGS.

Sustaining objection to question on cross-examination in proceeding to restrain railroad from substituting care-taker for agency service at certain station, see EVIDENCE, 12.

Lack of power of State Commission to vary plans approved by Interstate Commerce Commission for erection of interstate union station, see INTERSTATE COMMERCE, 1.

Assumption by State Commission of comparative accuracy of estimate of Interstate Commerce Commission as to probable cost of union station, see INTERSTATE COMMERCE, 2.

Entry of order by State Commission specifically conditioned upon promulgation by Interstate Commerce Commission of such further certificates and findings as might be necessary to authorize construction, extensions, and abandonment incident to establishment of interstate union terminal, see INTERSTATE COMMERCE, 3.

Jurisdiction over spur tracks extending from end of existing main line, see INTERSTATE COMMERCE, 5.

Competition by transportation companies, see MONOPOLY AND COMPETITION, 11–27.

Disapproval of unexplained and irrelevant clause confirming right of railroad to operate lines within city in contract between these two parties, see MUNICIPALITIES, 1.

Determination of character of railroad by Commission, see PUBLIC UTILITIES, 2.

RAILROADS—*continued.*

Lumber company owning and operating logging railroad for hauling its own products as neither a railroad corporation, a common carrier, nor a public utility, see PUBLIC UTILITIES, 11.

Rehearing of Commission proceeding in which railroad is ordered to extend siding on private property to adjoining land, see REHEARING, 1.

Recapture of railroad earnings, see RETURN, 25–31.

Lack of Commission jurisdiction to order railroad to extend siding on private property, see SERVICE, 3.

Statutory provision requiring equality of accommodations by railroad as meaning reasonable as well as equal facilities, see SERVICE, 5.

Return as a whole with respect to right to discontinue unprofitable service, see SERVICE, 11.

Substitution of motor bus service for railway service, see SERVICE, 22–25.

Railroad service, see SERVICE, 28–33.

Annotation on standard clearances, p. 846.

Annotation on zone rule relating to superior rights of trains, p. 846.

1. The use of guard rails between tracks running through tunnels would not be a safety measure such as would afford protection against trains side-swiping the walls of the tunnels, but the use of such rails would increase the difficulties attendant upon the placing of locomotive engines and cars back on tracks in cases of derailment, would unnecessarily increase the hazards of railroading in the operation of freight trains through tunnels, and would not afford any appreciable amount of protection to the train crews operating trains through them. Brotherhood of Locomotive Firemen and Enginemen v. All Railroads (Ind.) 844.

RATES.

I. In general, 1.

II. Powers of state, 2.

III. Jurisdiction, powers, and duties of Commissions, 3–7.

a. In general, 3–5.

b. Rates fixed by contract, 6, 7.

IV. Reasonableness, 8–13.

a. Competition as a consideration, 8.

b. Cost and value of service as a consideration, 9–13.

V. Contract rates, 14.

VI. Minimum charges, 15–17.

VII. Rates of particular utilities, 18–36.

a. Electric, 18–22.

b. Gas, 23.

c. Street railway, 24–28.

d. Telephones, 29–34.

1. In general, 29, 30.

2. Long distance service, 31–34.

e. Water, 35, 36.

VIII. Test period, 37–42.

RATES—*continued.*

I. In general.

Discrimination as to rates, see DISCRIMINATION.

Guaranty of cheaper fare as factor affecting authorization of motor bus competition, see MONOPOLY AND COMPETITION, 13.

Order of Interstate Commerce Commission providing for recapture of earnings as not invalid on ground that Commission has not prescribed group rates in accordance with Interstate Commerce Act, see RETURN, 27.

Annotation on jurisdiction of courts over rates, p. 280.

Annotation on kinds or classes of rates, p. 282.

Annotation on rate schedules, p. 282.

1. A question, raised by evidence as to the regularity of internal corporate relations affecting the fairness of proposed rates, justifies the withholding of approval thereof, until such doubt is dissipated by a full disclosure of the utility. Public Utilities Commission v. East Providence Water Co. (R. I. Sup. Ct.) 141.

II. Powers of state.

2. State regulation of rate of tolls does not give a utility the exclusive right to maintain its bridges, since by devoting its property to public use, it subjects the same to state regulation. Muscoda Bridge Co. v. Muscoda (Wis. Sup. Ct.) 146.

III. Jurisdiction, powers, and duties of Commissions.

a. In general.

Necessity for operation of motor carrier service whose route is largely between different cities as strictly a matter for determination of Commission notwithstanding law giving city power to supervise rates and service, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 10.

Application of traction utility to increase fares on bus routes forming part of municipal transportation system as not within Commission jurisdiction, see COMMISSIONS, 4.

Ordinances as not operating to nullify Commission law imposing upon the Commission the duty to regulate rates and supervise service, see COMMISSIONS, 18.

Annotation on jurisdiction of Commissions over rates, p. 280.

Discussion of the power of a Commission to change the terms of a contract between two telephone companies relating to interchange of messages, p. 132.

3. A statute (Gen. Laws Mass. Chap. 159, § 14), requiring the Commission, before it sets aside rates fixed by a carrier, to determine that the same are unjust and unreasonable, and if it be of such opinion, to determine the just and reasonable rates therefor, is mandatory and obliges the Commission to allow such rates as will give a fair return upon the capital employed in the undertaking. Re Holyoke Street R. Co. (Mass.) 578.

4. A Commission has no jurisdiction to limit the existence of rates found to be just and reasonable by its own prior order, and any attempted

RATES—*continued.*
subsequent limitation by order is void and of no effect. State ex rel. Campbell Iron Co. v. Public Service Commission (Mo. Sup. Ct.) 17.

5. A utility may reduce its rates without the formality of a hearing by merely filing the new schedule with the Commission, which will not interfer unless the successful operation of the utility is threatened or unjust discrimination caused thereby. Farmers Teleph. Co. v. Wisconsin Teleph. Co. (Wis.) 486.

b. Rates fixed by contract.

6. The Commission reserves the inalienable right to alter or amend rates at any time whether or not fixed by contract, and hence is not concerned with the length of time such a contract is to be effective. Re Menominee & M. Light & Traction Co. (Mich.) 87.

7. An order permitting the operation of a contract for special rates between a utility and a large consumer does not approve or disapprove of the contract but merely the conditions of service which affect rates and will require the extension of similar terms to all other consumers under like circumstances. Re Menominee & M. Light & Traction Co. (Mich.) 87.

IV. Reasonableness.

Duty of Commission to allow reasonable rates, see supra, 3, 4.
Solicitation of business and cost of equipment as affecting rates for air heating, see infra, 21, 22.
Burden of proof cast upon utility seeking increased rates to prove true valuation, see VALUATION, 1.

Annotation on reasonableness of rates, p. 281.

a. Competition as a consideration.

Competitive rate cutting, see MONOPOLY AND COMPETITION, 28, 29.

8. Unless there is a request for authority to increase rates by a utility, the reasonableness of the rates cannot be put in issue, and a complaint of a competitive utility against a reduction of rates as unreasonable must be dismissed. Farmers Teleph. Co. v. Wisconsin Teleph. Co. (Wis.) 486.

b. Cost and value of service as a consideration.

Rate of 5.28 per cent return on valuation of canal company as not confiscatory in view of complications in operating system and evidence tending to show rates in excess of value of service, see RETURN, 24.

Annotation on value and cost of service as affecting reasonableness, p. 849.

Discussion of deflection of patronage due to increased rates, p. 172.

9. In determining the value of telephone service to the subscriber, the size of the exchange, the number of subscribers, business and resident, the density of population, the size, character, saturation, and economical condition of the territory served, and the nature of use made of service are all elements to be considered. Re Mountain States Teleph. & Teleg. Co. (Idaho) 269.

10. In establishing just and reasonable rates, the cost of service to the

RATES—*continued.*
utility and the value of service to the consumers must be duly considered. Re Mountain States Teleph. & Teleg. Co. (Idaho) 269.

11. The Commission will not approve an increase of rates which, although deserving, appears likely to result in loss of essential patronage, but it will endeavor to adjust the increase to such proportions as will be likely to evade this hazard. Re Mountain Water Service Co. (N. J.) 287.

12. The Comission must establish reasonable rates based upon the cost of the service. Re State Teleph. Co. (Wis.) 249.

13. In creased rates allowed on a presumption of immediate improvement of service will be improper and discontinued if such improvements are not later established. Re North-West Teleph. Co. (Wis.) 480.

V. Contract rates.

Jurisdiction of Commission over rates fixed by contract, see supra, 6, 7.

Requirements that to isolated subscriber must be reasonable in proportion to cost of service regardless of agreement, see DISCRIMINATION, 5.

Preferential rates under contracts which may not have been discriminatory when created but have become so as required to give way whenever a rate regulatory body prescribes just and reasonable rates, see DISCRIMINATION, 11.

Annotation on rate franchises and contracts, p. 282.

Discussion of purchase or stated rental of privileges by utility from a large customer rather than reduced rate contracts in consideration therefor, p. 289.

14. A former contract consumer once electing to avail himself of the status of a noncontract consumer, may not thereafter reinstate himself under the contract over the objection of the utility. Sutter Butte Canal Co. v. Railroad Commission (Cal. Sup. Ct.) 811.

VI. Minimum charges.

15. A water consumer charged with a minimum amount for water service to a number of his tenants cannot complain that the utility has not provided each tenant with a service pipe and separate meter where he has previously refused to make the necessary plumbing rearrangements so that the utility could install individual meters. Brubaker & Bros. v. Millersburg Home Water Co. (Pa.) 808.

16. A water utility may properly charge the owner of a house, having sixteen tenant consumers being supplied through a single meter, an amount of sixteen minimum charges and thereafter at the rate per thousand gallons making due allowances for vacancies, where a rule of the utility provides: "The service line to which the company will attach a meter must be a separately controlled service line supplying a single consumer." Brubaker & Bros. v. Millersburg Home Water Co. (Pa.) 808.

17. The Commission can be guided in determining the proper minimum charge per customer only by the size of the meter that would normally be required to supply an individual consumer in any case where each consumer is receiving service through an individual meter. Brubaker & Bros. v. Millersburg Home Water Co. (Pa.) 808.

RATES—*continued.*

VII. Rates of particular utilities.

Annotation on railroad rates, pp. 283, 850.

a. Electric.

Authorization of experimental active-room rate schedule, see infra, 37, 38.

Unlawful discrimination as not resulting from electric rate schedule under which customer by paying higher demand charge pays lower rate per kilowatt hour, see DISCRIMINATION, 3.

Charge to railway department of combined utility for electricity supplied by electric department, see RETURN, 4.

Discussion of Commission's lack of sympathy with a proposed active-room rate, p. 278.

18. Rates for current used by electrical refrigerators are discriminatory if higher than rates for ordinary domestic heating and cooking devices, the off-peak advantage being more pronounced and the load factor better by reason of the more continuous use of energy. Mayer v. Illinois Northern Utilities Co. (Ill.) 529.

19. A petition for the increase of a minimum monthly charge signed by most of the consumers of an electrical utility was dismissed at the request of the latter in view of the fact that the expense of a hearing required by law would be greater than the relative advantages derived from the increase. Re Madison Light & P. Co. (Ind.) 847.

20. An electric company serving a village with a population of 200 was required to file a rate schedule constructed upon a kilowatt-per-month basis instead of the so-called room-rate schedule. Re Farmers Elevator Co. (N. D.) 469.

21. A proposed increase of rates for electric air heating was held likely to result in loss of a certain class of customers, causing a loss by discontinued service to such consumers as had invested in electric heating equipment as well as added cost of installing different heating apparatus. Department of Public Works ex rel. Patrons v. Washington Water Power Co. (Wash.) 122.

22. A proposed increase of rates for air heating by an electric utility was rejected and a more moderate increase ordered where it appeared that although the current rates were noncompensatory and discriminatory such patrons were originally solicited by the utility and had installed equipment for such service at considerable expense and, therefore, the loss should be distributed equitably between the utility and consumers. Department of Public Works ex rel. Patrons v. Washington Water Power Co. (Wash.) 122.

b. Gas.

Annotation on gas rates, p. 282.

23. Trustworthy evidence establishing the fact that a decrease or increase of B.T.U. content is followed by an increase or decrease in consumption, a gas rate rule was changed so that whenever the B.T.U. content of gas should be reduced, the rate schedule for gas should be also reduced in direct proportion. Re Rule 18 Regulating Heating Value of Gas (Colo.) 657.

RATES—*continued.*

c. Street railway.

Annotation on street railway rates, p. 851.

24. A street railway company was allowed a single cash fare of 10 cents and a ticket rate of four tickets or tokens for 30 cents, with a 5-cent fare for school children. Re Georgia Power Co. (Ga.) 830.

25. A higher street railway fare is justified on a line outside of the city where the traffic density is far below the traffic density on other suburban district lines. Re Georgia Power Co. (Ga.) 830.

26. Fares for school children on a street railway were fixed at 20 tickets or tokens for $1, each ticket or token being good for one continuous ride with transfer, the sale of such books of tickets or tokens to be issued under proper rules of identification by the company, subject to the approval of the Commission. Re Georgia Power Co. (Ga.) 830.

27. A proposed increase of rates providing for pupils' tickets costing two-thirds as much as adults was so modified that the cost of pupils' fares was practically one-half regular fare in all zones. Re Holyoke Street R. Co. (Mass.) 578.

28. Zone limits were so adjusted as to give patrons from one community along the route as long a ride for the same money as patrons from any other community. Re Holyoke Street R. Co. (Mass.) 578.

d. Telephones.

1. In general.

Value of telephone service to subscriber as affected by size of exchange, number of subscribers, business and resident, density of population, size, character, saturation, and economic condition of territory served and nature of use made of service, see supra, 9.

Requirements that to isolated subscriber must be reasonable in proportion to cost of service regardless of agreement, see DISCRIMINATION, 5.

Gross and net telephone rates, see PAYMENT, 1.

Annotation on telephone rates, p. 285.

Annotation on nonsubscriber charge in a telephone rate, p. 852.

29. A rate of 5 cents per call at a local pay station of a telephone company was approved. Re State Teleph. Co. (Wis.) 249.

30. A telephone company should not make an installation charge when the instrument is in place at the time the subscriber commences to take the service, although such a charge is permissible where no instrument is in place, this charge, less amounts owing by the patron, to be refunded if service is continued for two years. Re Westby Teleph. Co. (Wis.) 610.

2. Long distance service.

Free interexchange service as discriminatory, see DISCRIMINATION, 1, 4.

General reduction of rates rather than free interexchange service as remedy for excessive return, see RETURN, 20.

31. In the absence of other evidence as to the reasonableness of a proposed toll charge, it will be presumed fair if it is the usual and customary

RATES—*continued.*
one made in similar territory under like conditions. Re Montezuma County Teleph. Co. (Colo.) 518.

32. The fact that certain business conditions have grown up as a result of a long period of unlimited and free interexchange between two neighboring towns, cannot prevent the establishment of a toll rate which is reasonable, upon proof that the former practice was discriminatory. Re Montezuma County Teleph. Co. (Colo.) 518.

33. The Commission will not interfere with the terms of a contract between two connecting companies, providing for free interchange of messages, for the purpose of imposing a toll rate, unless the establishment of such toll rate is shown to be necessary in the interest of reasonably adequate service or to prevent or remove unjustifiable discrimination. Re St. Croix Valley Teleph. Co. (Wis.) 131.

34. The standard toll rate in effect in the major portion of a state should be put in effect by an independent telephone company as well as a statewide company, assuming that the standard of service is identical. Re State Teleph. Co. (Wis.) 249.

e. Water.

Annotation on water rates, pp. 287, 851.

Discussion of submission of large users to increased rates at an immediate loss to convenience employees who are also utility consumers, p. 71.

35. Where water supplied to a suburban city must be pumped twice to attain sufficient pressure, a water utility is justified in asking a rate differential. Re East St. Louis & I. Water Co. (Ill.) 57.

36. A city at the end of a water main formerly installed for transmission purposes of fire hydrant service with increased rates to defray expenses thereunto incident, is entitled to a reduction of rates when subsequent development of intermediate territory allows profitable distribution of other service along the main. Re East St. Louis & I. Water Co. (Ill.) 57.

VIII. Test period.

Annotation on test periods of rates, p. 852.

37. In authorizing an experimental period for a proposed active-room rate by an electric utility, charges for service were ordered to be set out upon billings both for old and optional service, and a verified and separate account of extra cost for billing was ordered, same to be presented at a later hearing to decide the result of the experiment. Re Northern Indiana Power Co. (Ind.) 273.

38. A proposed schedule of active-room optional electric rates was made effective over a trial period of time and a public hearing for consideration of experience with these schedules set. Re Northern Indiana Power Co. (Ind.) 273.

39. While the Commission has power to enter a temporary order to test the accuracy and reasonableness of proposed telephone rates, such orders are subject to review by the court upon application of an opposing city under Rev. St. 1919, § 10522. State ex rel. Campbell Iron Co. v. Public Service Commission (Mo. Sup. Ct.) 17.

40. A Commission has no jurisdiction to make extension of a temporary

RATES—*continued.*
order to test the reasonableness of proposed telephone rates pending a review of the same by a court upon application of a municipality. State ex rel. Campbell Iron Co. v. Public Service Commission (Mo. Sup. Ct.) 17.

41. Former rates of a telephone company do not automatically go into effect upon expiration of rates directly in a temporary test order of the Commission which is under review of the court upon application of the city. State ex rel. Campbell Iron Co. v. Public Service Commission (Mo. Sup. Ct.) 17.

42. While the function of a Public Service Commission is to determine and fix just and reasonable rates, and in so doing it may require reports of a utility over a test period and reserve jurisdiction to make further orders, nevertheless on the issuance of a writ of review, its jurisdiction to make further orders ceases and the current rates remain in force until decision by the courts. State ex rel. Campbell Iron Co. v. Public Service Commission (Mo. Sup. Ct.) 17.

REASONABLENESS.
Of rates, see RATES, 8–13.
Of return, see RETURN, 11–13.

RECAPTURE.
Recapture of railroad earnings, see RETURN, 25–31.

RECEIVERS.
Preference of receivers of street railway in establishment of bus route over old traction routes, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 44.
Authorization of motor carrier service by receivers of trolley line dependent upon prompt installation of actual service to avoid speculation, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 48.

RECORDS.
Question of validity of municipal ordinance as not to be passed upon by Supreme Court of United States without aid of discussions by members of lower courts familiar with local law, see APPEAL AND REVIEW, 3.
Actual records or city map as basis for valuing main, see EVIDENCE, 1.

REFRIGERATORS.
Electric rates for refrigerator service, see RATES, 18.

REFUNDING.
Issuance of bonds in excess of two-thirds of amount of paid up capital stock notwithstanding law prohibiting issuance in such proportion where purpose is to take up valid and outstanding obligation created by original bond issue, see SECURITY ISSUES, 8.

REFUNDING—*continued.*

Objection relating to possible interference with municipal acquisition as not material on application for authority to issue securities for refunding, see SECURITY ISSUES, 9.

REFUSAL.

Formal refusal of municipality along proposed bus route as not necessary to give Board discretion to act on application, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 14.

REHEARING.

Order for Commission rehearing on reversal of Commission's finding of fact raised on appeal under constitutional provision, see APPEAL AND REVIEW, 2.

Necessity of evidence to show that selling party still has in fact possession of stock and is in position to carry out terms of original contract to warrant reconsideration by Commission of former ruling refusing permission to traction utility to purchase capital stock of bus utility, see CONSOLIDATION, MERGER, AND SALE, 1.

Successive rehearings before Commission, see PROCEDURE, 2.

1. The court, on certiorari to review a Commission order requiring a railroad to extend a siding on private property to adjoining land for use by the occupant of that land, ordered that a rehearing pursuant to § 38 of the Utility Act should be had before the Commission to determine the existence of a valid easement over the primary tract in favor of the railroad and available to the owner of the secondary tract, the matter not having been adequately presented to the Commission. Rahway Valley R. Co. v. Public Utility Comrs. (N. J. Sup. Ct.) 135.

RENTALS.

Ownership of telephone instruments and payment of rental therefor, see SERVICE, 34.

REORGANIZATION.

Reorganization plan of street railway, see SECURITY ISSUES, 4–7.

Valuation of property for valuation proceeding involving issuance of securities, see VALUATION, 12.

REPARATION.

1. The Commission has authority to handle reparation matters in an informal manner. Cadillac-Soo Lumber Co. v. Duluth, S. S. & A. R. Co. (Mich.) 539.

2. A complaint asking reparation is seasonably filed when within the two-year period designated by § 10–G, of Act 300, Public Acts of 1909 of Michigan, as amended; the claim for reparation is filed with the Commission and acknowledged although the Commission may have been requested to place the matter upon the formal docket after the expiration of the time

REPARATION—*continued.*
limitation. Cadillac-Soo Lumber Co. v. Duluth, S. S. & A. R. Co. (Mich.) 539.

3. The Commission has the authority to investigate, hear, and decide and make appropriate orders permitting and authorizing, but not attempting to compel, a public utility to refund any amount found to be an excessive, unlawful, or unreasonable charge. Chicago, M. & St. P. R. Co. v. Railroad Commission (Wis. Sup. Ct.) 502.

4. The effect of an order of the Commission authorizing a railroad to make a refund of a charge found to be unreasonable is to give apparent or prima facie authority to the utility to pay any particular shipper that which, except for such orders, might seem to be an unlawful preference. Chicago, M. & St. P. R. Co. v. Railroad Commission (Wis. Sup. Ct.) 502.

5. Upon the refusal of a carrier to make a refund authorized by the Commission, the aggrieved party may by statute (St. 1925, § 195.54) sue in the state courts to recover the amount of the excessive charge but the findings of the Commission in such case shall only be prima facie evidence of the truth of the facts found by it. Chicago, M. & St. P. R. Co. v. Railroad Commission (Wis. Sup. Ct.) 502.

REPEAL.

Suit against Commission under law giving body discretion in regulating viaduct structures as not subject to operation of later law making it mandatory unless found impracticable by the Commission that all viaducts should be at least 22 feet above track, see CONSTITUTIONAL LAW, 17, 18.

REPORTS.

Revocation of certificate for failure to pay tax or file monthly report of mileage, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 52.

REPRODUCTION COST.

Duty of Commission to follow decisions of superior court to the effect that reproduction cost new less depreciation must be given consideration in ascertaining fair value, see COMMISSIONS, 19.

Function of depreciation reserve to return original cost and not reproduction cost, see DEPRECIATION, 2.

Use of, in valuation, see VALUATION, 3, 6, 7, 11.

RESERVES.

Order of Interstate Commerce Commission directing payment of excess earnings into reserve fund as not denying use of railroad of what was its private property, see CONSTITUTIONAL LAW, 14.

Function of depreciation reserve to return original cost and not reproduction cost, see DEPRECIATION, 2.

Reduction of depreciation allowance in view of excessive reserve for accrued depreciation, see DEPRECIATION, 3.

Allowance for contingent reserve of street railway, see RETURN, 3.

RESERVES—*continued.*

Measurement of return of railroad by net revenue remaining after deducting amount to be paid over to government without deducting amount to be placed in reserve fund, see RETURN, 25.

Validity of order of Interstate Commerce Commission providing for recapture of excess earnings and for payment into reserve fund, see RETURN, 28.

RESTRICTIONS.

Restrictions on competition, see MONOPOLY AND COMPETITION, 30–34.

RETIREMENTS.

Allowances for depreciation, see DEPRECIATION.

RETROSPECTIVE LEGISLATION.

Retrospective legislation under constitution, see CONSTITUTIONAL LAW, 17, 18.

RETURN.

I. Basis, 1, 2.

II. Operating expenses and other deductions from gross revenues, 3–10.

III. Reasonableness, 11–13.

IV. Return of particular utility, 14–23.

a. Electric, 14–16.

b. Street railway, 17–19.

c. Telephone, 20–22.

d. Water, 23.

V. Confiscation, 24.

VI. Recapture of earnings, 25–31.

Apportionment of revenues between stations, see APPORTIONMENT, 1.

Loss of revenues by existing railroad carriers over territory included in proposed route of motor utility as not proof of lack of demand for service, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 38.

Withholding approval of rates pending investigation of evidence as to regularity of internal corporate relations, see RATES, 1.

Guaranty of revenue to obtain service extension, see SERVICE, 7.

Relation of working capital to operating expenses, revenues, and collection periods, see VALUATION, 22.

Operating revenues for fiscal periods as bearing upon going value, see VALUATION, 27.

Use of property measured by revenue derived therefrom expressed in dividends and surplus as determining going value, see VALUATION, 29.

RETURN—*continued.*

I. Basis.

Allowance of return based on value of security issues, see **infra, 19.**

1. The fair value of street railway property devoted to the public use must be determined in order to determine whether the company is earning a reasonable return. Re Georgia Power Co. (Ga.) 830.

2. Capitalization is not the proper basis for rates. Re Georgia Power Co. (Ga.) 830.

II. Operating expenses and other deductions from gross revenues.

Amortization of excessive purchase price, see ACCOUNTING, 1.

Relation of working capital to operating expenses, revenues, and collection periods, see VALUATION, 22.

3. An allowance of 1 per cent of the gross revenues of a street railway system for a contingent reserve was approved. Re Georgia Power Co. (Ga.) 830.

4. The charge to a railway department of a combined utility for electricity supplied by the electric department should not be less than the charge to wholesale industrial customers. Re Georgia Power Co. (Ga.) 830.

5. Charges to operating expenses of a street railway company for street paving costs and a gross receipts tax, although not within Commission control, must be given consideration in determining a proper rate of fare. Re Georgia Power Co. (Ga.) 830.

6. Figures of the Commission engineer as to yearly operating expenses not objected to or shown to be erroneous by either the utility or opposing parties will be deemed substantially correct. Re East St. Louis & I. Water Co. (Ill.) 57.

7. An allowance of 3 per cent of gross revenues of a water utility to a parent company in lieu of salaries of general officers in recompense of engineering, accounting, and other services rendered the local organization, was approved upon a showing that the value received by the subsidiary was at least equal to the payment. Re East St. Louis & I. Water Co. (Ill.) 57.

8. A telephone utility was ordered not to charge to operating expenses a sum greater than $50 a month as compensation for service rendered as member of the executive committee attached to company's organization. Re Home Teleph. Co. (Ind.) 445.

9. In an effort to reduce the operating expenses of a utility operating a number of exchanges under different local circumstances and conditions, to a unit per company telephone, the Commission excluded a specific amount per service station that seemed to represent the actual additional cost of the utility for furnishing switching service. Re North-West Teleph. Co. (Wis.) 480.

10. The Commission concluded that the usually reduced cost of maintenance of grounded lines as compared with metallic exchanges of the same company was offset by the great length of the former, and the same cost allowed for both. Re North-West Teleph. Co. (Wis.) 480.

III. Reasonableness.

Operation of interstate railroad as a single system, see **infra, 31.**

RETURN—*continued.*

Question whether Interstate Commerce Commission has erroneously decided that railroads under common control and management were operated as single system as judicially examinable by court in injunction proceeding against Commission order for recapture of earnings, see APPEAL AND REVIEW, 9.

Question whether operation as a whole can be made to pay as a factor in authorizing motor bus operation, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 32.

Duty of Commission to allow rates which will produce fair return on capital employed, see RATES, 3.

Return as a whole with respect to right to discontinue unprofitable service, see SERVICE, 11.

Authorization of abandonment of motor bus operation in view of inadequate return, see SERVICE, 12.

Revenue per train as an element to be considered in deciding whether service should be discontinued, see SERVICE, 18.

Return as a whole considered with respect to discontinuance of interurban railway service, see SERVICE, 20.

Adequacy of return as a whole as affecting through and separate passenger train service, see SERVICE, 28.

11. The return of gas, electric, and street railway properties should not be treated as a whole for the purpose of determining whether the street railway fares are adequate. Re Georgia Power Co. (Ga.) 830.

12. A public utility should be allowed rates which, under reasonably prudent and economical management, will yield a return sufficient to enable it to sell its shares of stock, since by the laws of the Commonwealth it is obliged to sell them at par or not at all and the ability to serve is thus dependent upon its credit and financial soundness. Re Holyoke Street R. Co. (Mass.) 578.

13. Regardless of inaccuracies of utility estimates for increased rates, the Commission will recognize that improved and adequate service is more expensive than former inadequate service and will endeavor to adjust rates to allow a fair return on the additional investment. Re North-West Teleph. Co. (Wis.) 480.

IV. Return of particular utility.

a. Electric.

14. Seven per cent was held a fair return for an electric utility. Re Farmers Elevator Co. (N. D.) 469.

15. An allowance of 8 per cent was made for the return of an electric utility, consideration being given to present market quotations. Starkweather v. Northern Utilities Corp. (N. D.) 699.

16. A general rate structure yielding approximately 7 per cent on the investment of an electric utility was held to be sound notwithstanding a proven inadequacy in particular rates for air heating. Department of Public Works ex rel. Patrons v. Washington Water Power Co. (Wash.) 122. P.U.R.1928A.

RETURN—*continued.*

b. Street railway.

17. An increase of rates will be allowed rather than a serious impairment of service by proposed operating economies in order to secure an adequate return to a street railway. Re Fresno Traction Co. (Cal.) 167.

18. A return of approximately 3.8 per cent on street railway property cannot be justified as a reasonable return, and shows conclusively that an increase in revenue is demanded. Re Georgia Power Co. (Ga.) 830.

19. An increase of fares was allowed to a street railway company to secure a return of 6 per cent on the value of security issues. Re Holyoke Street R. Co. (Mass.) 578.

c. Telephone.

20. Where the inauguration of a toll charge would yield an excessive return, the remedy is in a general reduction of rates and not in free interexchange service. Re Montezuma County Teleph. Co. (Colo.) 518.

21. A return of 6 per cent on the depreciated cost of the physical property of a telephone utility was approved. Re Industry Teleph. Co. (Ill.) 435.

22. A telephone rate schedule estimated to produce a return of substantially 8 per cent was approved. Re Westby Teleph. Co. (Wis.) 610.

d. Water.

23. An increase of rates calculated to earn a return between 6 per cent and 7 per cent of utility value was allowed. Re East St. Louis & I. Water Co. (Ill.) 57.

V. Confiscation.

Order of Interstate Commerce Commission directing payment of excess railroad earnings over to Commission as not open to attack upon ground of wrongful valuation if net earnings, less amount paid over are not confiscatory, see infra, 26.

Order of Interstate Commerce Commission directing payment of excess earnings into reserve fund as not denying use of railroad of what was its private property, see CONSTITUTIONAL LAW, 14.

24. The rate of 5.28 per cent return of valuation of a canal company was not considered, as a matter of law, so low as to be confiscatory in view of many complications in operating the system and evidence tending to show rates in excess of value of service. Sutter Butte Canal Co. v. Railroad Commission (Cal. Sup. Ct.) 811.

VI. Recapture of earnings.

Question whether Commission has erroneously decided that railroads under common control were operated as single system as judicially examinable by court in injunction proceeding against Commission order for recapture of earnings, see APPEAL AND REVIEW, 9.

25. The return to a railroad in a case involving the recapture of excess earnings under the Interstate Commerce Act is to be measured by the net revenue remaining after deducting only the amount to be paid over to the P.U.R.1928A.

RETURN—*continued.*
government without deducting the amount to be placed in a reserve fund. St. Louis & O'Fallon R. Co. v. United States (U. S. Dist. Ct.) 740.

26. An order of the Interstate Commerce Commission directing the payment of one-half of excess railroad earnings over to that body is not open to attack upon the ground of wrongful valuation if the net earnings, less the amount ordered paid over to the government, be an ample return on the value claimed by the carriers for each of the recapture periods. St. Louis & O'Fallon R. Co. v. United States (U. S. Dist. Ct.) 740.

27. An order of the Interstate Commerce Commission providing for recapture of excess earnings of interstate railroads cannot be declared invalid on the ground that the Commission had not, prior to any of the recapture periods, prescribed group rates required by § 15-A, paragraphs 2 and 3, of the Interstate Commerce Act. St. Louis & O'Fallon R. Co. v. United States (U. S. Dist. Ct.) 740.

28. An order of the Interstate Commerce Commission providing for recapture of one-half of the excess earnings of an interstate railroad and for the payment of the other one-half into a reserve fund is not invalid on the ground that § 15-A of the Interstate Commerce Act does not impress a trust upon such portion of the excess fund. St. Louis & O'Fallon R. Co. v. United States (U. S. Dist. Ct.) 740.

29. An order of the Interstate Commerce Commission providing for the recapture of excess earnings of interstate railroads should require the interest from the date when, under the order, the payments found due by the order should be made, but should not require interest from four months after the respective recapture periods. St. Louis & O'Fallon R. Co. v. United States (U. S. Dist. Ct.) 740.

30. The Interstate Commerce Commission may, under the Interstate Commerce Act, provide for recapture of excess railroad earnings for the periods between March 1, 1920, and August 26, 1920, although the increased rates installed under § 15-A, paragraph 2, of the act did not become effective until the latter date. St. Louis & O'Fallon R. Co. v. United States (U. S. Dist. Ct.) 740.

31. A finding that two railroads under common control and management did not constitute a single system within the meaning of Interstate Commerce Act, § 15-A, paragraph 6, 41 Statute 489, was held to be sustained by evidence that a gap existed in physical connection, that there was no common traffic moving one way over the two carriers and only a small percentage the other way, and that there was no financial interdependence between them so that the low earnings of one corporation could be aided or recouped by the other, notwithstanding connections between them through a Terminal Association. St. Louis & O'Fallon R. Co. v. United States (U. S. Dist. Ct.) 740.

RETURN AS A WHOLE.

Reasonableness of return as a whole, see RETURN, 11.

Operation of interstate railroad as a single system, see RETURN, 31.

P.U.R.1928A.

REVENUES.

Generally, see RETURN.

Operating revenues for fiscal periods as bearing upon going value, see VALUATION, 27.

Use of property measured by revenue derived therefrom expressed in dividends and surplus as determining going value, see VALUATION, 29.

REVERSAL.

Grounds for reversal or modification, see APPEAL AND REVIEW, 24–26.

REVOCATION.

Of certificates of convenience and necessity, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 51–53.

RHODE ISLAND.

Court after hearing appeal from Commission rate order as required to enter final decree instead of directing Commission to enter final order or decree upon its record, see APPEAL AND REVIEW, 29.

ROOM RATES.

Construction of rate schedule upon kilowatt-per-month basis instead of room-rate schedule, see RATES, 20.

ROUTES.

Reservation of Commission right to order transportation whether on boulevards or central districts regardless of whether or not it is the announced policy of motor transportation utility to confine its operation to boulevards, see AUTOMOBILES, 1.

Commission as not restricted by terms of applications or certificates to relegate operations of utility to certain sections of city, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 7.

Lack of Commission power to divide route solicited in application for certificate, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 15.

Whether or not city will permit motor carrier to occupy route selected by carrier in application for certificate within corporate limits as matter to be determined by city, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 29.

Requirement that each applicant for certificate authorizing motor truck service state definitely the route or territory, and character of service contemplated, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 56.

Commission jurisdiction over motor carriers as not extending to carriers operating over irregular routes, not between fixed termini, see COMMISSIONS, 6.

Maneuvering of route to substitute street car service, see SERVICE, 16.

RULES AND REGULATIONS.

Exception to court ruling admitting evidence of rules of Commission regulating electric wiring as ground for reversal, see APPEAL AND REVIEW, 25.

Invalidity of Commission rule providing that no statement of utility employee shall bind company unless in writing and approved by official thereof, see COMMISSIONS, 9.

Constitutionality of delegation of legislative power to Commission to make minor rules and regulations, see CONSTITUTIONAL LAW, 2.

Section of Interstate Commerce Act providing for recapture of income from railroad as not invalid delegation of legislative power without prescribing method of procedure, see CONSTITUTIONAL LAW, 3.

Ordinance of municipality engaged in furnishing water prescribing rules and regulations for the same as having no greater force than by-law of private corporation, see MUNICIPAL PLANTS, 4.

Rules and regulations governing construction, operation, and maintenance of electric lines and equipment, see SERVICE, 26.

SALARIES AND WAGES.

Payment of percentage of gross revenues of water utility to parent company in lieu of salaries of general officers in recompense for engineering, accounting, and other services, see RETURN, 7.

Limitation on compensation of officer of telephone utility, see RETURN, 8.

SALE.

See CONSOLIDATION, MERGER, AND SALE.

SCHEDULES.

Restrictions on authorizing competitive motor bus service, see MONOPOLY AND COMPETITION, 30–34.

Operation on regular time schedule as not necessary to invest motor car operations with status of common carrier, see PUBLIC UTILITIES, 10.

Operator of motor carrier service on irregular schedule between fixed points as subject to regulation, see PUBLIC UTILITIES, 13.

Right of utility to reduce rates without formality of hearing by merely filing new schedule with Commission, see RATES, 5.

SCHOOL CHILDREN.

Cash and ticket fares on street railway with reduced rate for school children, see RATES, 24.

Fares for school children with plan for tickets, tokens, and sale of books, see RATES, 26.

Modification of proposed increase of fares for pupils, see RATES, 27.

SECONDARY EVIDENCE.

Exclusion of offer to show by oral testimony the contents of a letter, the absence of which was unaccounted for, see EVIDENCE, 9.

SECRETARY OF WAR.

Grant of certificate to one of two applicants who possesses permit or authorization from Secretary of War to transport passengers in and upon grounds of Federal hospital, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 43.

SECURITY ISSUES.

Necessity of evidence to show that selling party still has in fact possession of stock and is in position to carry out terms of original contract to warrant reconsideration by Commission of former ruling refusing permission to traction utility to purchase capital stock of bus utility, see CONSOLIDATION, MERGER, AND SALE, 1.

Refusal to decide question of advisability of sale of capital stock by one utility to another where contracting parties have no longer the ability to perform, see CONSOLIDATION, MERGER, AND SALE, 2.

Issue of new bonds to take up outstanding valid obligations in excess of two-thirds of value of paid up capital stock, notwithstanding prohibition against issuance of such proportions where indebtedness was created by original bonds issued under similar restrictions, see CONSTITUTIONAL LAW, 16.

Duty of public service corporations and stockholders to divulge corporate holdings, see PUBLIC UTILITIES, 4.

Capitalization as not the proper basis for rates, see RETURN, 2.

Requirement that utility be allowed rates which, under reasonably prudent and economical management, will yield return sufficient to enable it to sell stock, see RETURN, 12.

Allowance of return based on value of security issues, see RETURN, 19.

Requirement that prospective subscribers take stock in company in order to receive service as unlawful, see SERVICE, 6.

Allowance of increased rates on valuation measured by outstanding securities, see VALUATION, 9.

Annotation on notice, p. 515.

Annotation on amount and basis of securities, p. 516.

Annotation on invalid issues, p. 516.

Annotation on purpose of security issues, p. 516.

Annotation on sale price and interest rates, p. 516.

Annotation on stock dividends, p. 516.

Annotation on cost of financing, p. 517.

Annotation on fees payable, p. 518.

Annotation on proceeds from securities, p. 518.

1. The Commission must be advised of the party from whom certain equipment is to be bought, its condition, and the circumstances of the sale and its terms, before it will authorize the withdrawal of any utility funds for the purchase. Re Tracy Gas Co. (Cal.) 512.

2. A request for authority to issue additional stock because of a revised cost estimate in excess of the estimate on which an original tentative approval of the Commission was based, will be denied in the absence of some proof of the reason and soundness of the change, and authority given only for issues based upon the original estimate. Re Tracy Gas Co. (Cal.) 512. P.U.R.1928A.

SECURITY ISSUES—*continued.*

3. The imposition of conservative capitalization performs two-fold service to consumers of a utility who are also holders of its securities. Re Illinois Power & Light Corp. (Ill.) 776.

4. Security issues authorized by the State Commission in pursuance of its approval of a reorganization plan of a traction system still operated by receivers who had not yet formally transferred title to the reorganization committee, were not to be delivered or otherwise disposed of until the committee filed evidence of a complete and satisfactory transfer of the properties involved and due authorization of a proposed stock increase. Re United R. Co. (Mo.) 202.

5. The Commission found the financial condition and prospects of a transportation system serving the largest metropolitan center in the state, and one of the largest and most prosperous in the United States, sufficiently sound to warrant proposed capitalization under § 62, Public Service Law of Missouri. Re United R. Co. (Mo.) 202.

6. Approval of the financial methods proposed in the reorganization plan of a large traction utility does not bind the Commission to approve subsequent formal requests for authorization of security issues therein contemplated. Re United R. Co. (Mo.) 202.

7. A plan for reorganization of the traction system of a large city, approved by a large percentage of interested parties, was held to be complete and ready for Commission approval in that, while no request was made for the authorization of securities to provide for an existing cash deficit and the expense of reorganization, it did specifically provide for the manner in which such necessities might be financed. Re United R. Co. (Mo.) 202.

8. The issuance of bonds in excess of two-thirds of the amount of paid up capital stock will be authorized notwithstanding a law prohibiting issuance in such proportion where the purpose is to take up valid and lawful outstanding obligation created by an original bond issue also in violation of the two-third rule. Re Omaha & C. B. R. & Bridge Co. (Neb.) 689.

9. The Commission cannot consider an objection regarding the possible interference with proposed future efforts of a municipality to acquire a utility's property, in a hearing on an application by the latter for approval of a security issue for the purpose of refunding outstanding obligations. Re Omaha & C. B. R. & Bridge Co. (Neb.) 689.

SERVICE.

I. In general, 1, 2.

II. Jurisdiction and powers of Commissions, 3.

III. Duty to serve, 4–6.

IV. Extensions, 7–10.

V. Abandonment and discontinuance, 11–21.

VI. Substitution of service, 22–25.

SERVICE—*continued.*
VII. Particular utilities, 26–35.
a. Electric, 26.
b. Gas, 27.
c. Railroad, 28–33.
d. Telephone, 34, 35.

I. In general.

Evidence of necessity for motor carrier service, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 35–42.

Effect of utility's refusal of suggestion as to economies to avoid re-entry into area, creating burdens of duplication of service, see COMMISSIONS, 12.

Lack of complaints against existing utility as reason for concluding the absence of need for additional service by competitor, see MONOPOLY AND COMPETITION, 14.

Ordinance of municipality engaged in furnishing water prescribing rules and regulations for the same as having no greater force than by-law of private corporation, see MUNICIPAL PLANTS, 4.

Improved service as a condition subsequent to rate increase, see RATES, 13.

Recognition of expense of improvements in service, see RETURN, 13.

Allowance of increased rates rather than serious impairment of service by proposed operating economies, see RETURN, 17.

Annotation on meters, p. 860.

1. A contract for service between a consumer and an electric utility is not the basis of an action by the former for the damages caused by fire resulting from defective installation, but only the inducement to show the creation of the relation of the authority out of which the alleged breach of duty arose. Compton v. Alabama Power Co. (Ala. Sup. Ct.) 724.

2. The phrase "public convenience and necessity" means a reasonable necessity to meet a convenience of the public, and what is reasonably adequate service is a question of fact depending upon all the circumstances surrounding the case. Re Western Slope Motor Way (Colo.) 32.

II. Jurisdiction and powers of Commissions.

Commission as not restricted by terms of applications or certificates to relegate operations of utility to certain sections of city, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 7.

Necessity for operation of motor carrier service whose route is largely between different cities as strictly a matter for determination of Commission notwithstanding law giving city power to supervise rates and service, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 10.

Ordinances as not operating to nullify Commission law imposing upon the Commission the duty to regulate rates and supervise service, see COMMISSIONS, 18.

SERVICE—*continued.*

Lack of power of State Commission to vary plans approved by Interstate Commerce Commission for erection of interstate union station, see INTERSTATE COMMERCE, 1.

Jurisdiction over spur tracks extending from end of existing main line, see INTERSTATE COMMERCE, 5.

Annotation on jurisdiction of Commission to compel extensions, p. 597.

3. The Commission has no jurisdiction to order a railroad company to extend a siding on private property to adjoining land for use by the occupant of the latter land, unless there is adequate, not to say indubitable, proof of the existence of a valid easement over the primary tract, not merely in favor of the railroad, but available under the utility act in favor of the owner of the secondary tract. Rahway Valley R. Co. v. Public Utility Comrs. (N. J. Sup. Ct.) 135.

III. Duty to serve.

Forfeiture of certificate for failure to serve, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 53.

Adequacy of service as a factor affecting competition, see MONOPOLY AND COMPETITION.

4. The duty to serve is neither greater nor less by reason of a contract for service where a dedication of water service has been made for lands by a canal company. Sutter Butte Canal Co. v. Railroad Commission (Cal. Sup. Ct.) 811.

5. A statutory provision (G. L. 5231) requiring equality of accommodations furnished by a railroad must be construed to mean "reasonable" as well as "equal" facilities, taking into consideration the due proportions and requirements of stations of different size and doing different amounts of business. Royalton v. Central Vermont R. Co. (Vt. Sup. Ct.) 633.

6. The requirement of a public utility that prospective subscribers take stock in the company in order to receive service from its lines is unlawful on the theory that a utility cannot require subscribers to share in the responsibility of the organization and it may not impose such conditions upon the granting of service. Re Prentice Mut. Teleph. Co. (Wis.) 613.

IV. Extensions.

Requirement that prospective subscribers take stock in company in order to receive service as unlawful, see supra, 6.

Testimony relative to inadequacy of present service as irrelevant in proceeding in which operation without certificate is complained against, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 3.

Application for spur track extending from end of existing main line as not evasion of statutes requiring certificate as condition precedent to construction of extension of main line, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 4.

Telephone extension to new residence of subscriber in territory served by another company, see MONOPOLY AND COMPETITION, 10.

Rehearing of Commission proceeding in which railroad is ordered to extend siding on private property to adjoining land, see REHEARING, 1.

SERVICE—*continued.*

Annotation on extensions of service, p. 856.

7. An electric utility should not be required to make a comparatively large investment necessary for service to a group of new patrons without some assurance of reasonably adequate revenue for a definite length of time. Parker v. Central Maine Power Co. (Me.) 852.

8. An electric utility should extend its lines to render service within the territory which the company undertakes to serve if the extension can be made without placing any undue burden on the company's other patrons. Parker v. Central Maine Power Co. (Me.) 852.

9. An electric utility must extend service within reasonable limitations to serve all in its territory who apply. Merrifield v. Mountain States Power Co. (Mont.) 798.

10. Each case in which an application for an extension of service is considered must be determined upon its own facts, when the subject of extensions has not been fully developed by appropriate investigation and fundamental regulations established. Merrifield v. Mountain States Power Co. (Mont.) 798.

V. Abandonment and discontinuance.

Adequacy of return as a whole as affecting through and separate passenger train service, see infra, 28.

Discontinuance of service to enforce payment, see PAYMENT, 3.

Annotation on abandonment or discontinuance of service, pp. 597, 857.

Annotation on abandonment of service because of inadequate return, pp. 597, 859.

Annotation on abandonment of service as affected by return as a whole, p. 598.

Annotation on abandonment or discontinuance of railroad station agency service, p. 857.

Annotation on improper action of patrons as a ground for discontinuing service, p. 859.

Discussion of inadvisability of continuing an unprofitable branch line at the risk of total abandonment of service, p. 5.

Statement that where an interurban railway seems to be steadily abandoning its less lucrative lines, the Commission should not approve until it is acquainted with the full extent of the utility's plans and program, p. 11.

11. The fact that a railroad company is earning a substantial profit on its freight service on a branch is not conclusive in determining whether the railroad should be permitted to curtail passenger train service operated at a loss, although such operation at a loss is not in itself conclusive. Re Western Slope Motor Way (Colo.) 32.

12. A corporation should be authorized to abandon the operation of a motor bus line when the minimum transportation loss per mile has been 5.7 cents per bus mile and the maximum has run as high as 27.6 cents per bus mile, where there is railroad and traction transportation over the entire length of the route, and the bus will probably never be a paying proposition. Re Indiana Service Corp. (Ind.) 531.

SERVICE—*continued.*

13. Evidence of the unlawful diversion of electric current by tampering with the meter justifies a requirement that the patron install a lock box at his own expense, and that the company render service for a test period of one year to show whether the bills will show a substantial disagreement with previous years during which the question of diversion and the amount is in dispute, when the patron denies unlawful diversion and offers to pay the estimated loss of revenue if the bills show substantial disagreement. Handelman v. Union Electric Light & P. Co. (Mo.) 94.

14. The traveling public cannot be denied the service of street cars at a point as convenient to take advantage of as the service offered by taxicabs where the leading depot of a metropolitan city justifies street car service to its doors. Re Lincoln Traction Co. (Neb.) 861.

15. Authority to abandon tracks of a street railway company along highways to be resurfaced or repaved was granted so that the car company would not be required to contribute towards the expense, where the revenue had fallen off to such an extent that there were no funds to pay for the improvement. Re Lincoln Traction Co. (Neb.) 861.

16. An offer of a street railway company, on petitioning for discontinuance of part of its transit system, to make a turn at a former junction of a single track system and back down two blocks on a section of track on the route sought to be discontinued in order to furnish service to a depot was, in the opinion of the Commission, a most impractical and unreasonable movement. Re Lincoln Traction Co. (Neb.) 861.

17. A street railway company seeking to discontinue certain sections of its traction system was ordered to construct certain new track connections in an effort to unite certain branches of its system into one complete route serving the distant railroad depots as well as the central section of the city. Re Lincoln Traction Co. (Neb.) 861.

18. While the revenue per train is an important element to be considered in the discontinuance of service, the elements of public necessity and total revenue of entire operations may outweigh the former. Re Pennsylvania R. Co. (N. J.) 594.

19. Notwithstanding insufficient revenue to defray operating expenses, passenger trains were ordered continued upon showing that morning commutation between certain local cities would be seriously inconvenienced by discontinuance. Re Pennsylvania R. Co. (N. J.) 594.

20. Approved discontinuance of the least profitable line of an interurban system, operating as a whole at a loss, should not be enforced abruptly but only after such a lapse of time as will enable changed conditions to be met and opportunity for substitute means of transportation to be established if patronage be sufficient to attract the same. Re Hudson Valley R. Co. (N. Y.) 1.

21. The absence of public necessity for a less profitable route of an interurban system operating as a whole at a loss may be presumed from the inadequacy of revenue derived from patronage to maintain the service. Re Hudson Valley R. Co. (N. Y.) 1.

SERVICE—*continued.*

VI. Substitution of service.

Maneuvering of route to substitute street car service, see supra, 16.

22. Authority to curtail passenger train service between points served by a motor transportation company subsidiary to the railroad should not be denied on the ground that a county cannot afford to stand the expense of repairs and maintenance resulting from motor bus operation, if the damage to the road is more than counterbalanced by the taxes paid by the railroad and the taxes and license fees paid by the motor bus company. Re Western Slope Motor Way (Colo.) 32.

23. Authority was granted to curtail passenger train service operated at a loss on a branch line, except from July 1st to October 15th each year, provided that passenger train service should be rendered when the highway was impassable for motor busses or in such a condition that trips could not be made within a reasonable time. Re Western Slope Motor Way (Colo.) 32.

24. Upon the authorization of curtailment of passenger train service while motor bus service could be adequately rendered, it was ordered that a book be kept in the railroad and motor bus offices showing the number of the bus, date, time of departure, time of arrival, and cause for delay, which should be signed daily by the driver and initialed by the operator or agent for correctness provided such delay exceeded one-half hour. Re Western Slope Motor Way (Colo.) 32.

25. The substitution of busses for street cars to serve the traveling public on a route going to a depot was considered inadequate because the entrances to the busses and the narrow aisles and seats were such that people with baggage could not be accommodated. Re Lincoln Traction Co. (Neb.) 861.

VII. Particular utilities.

Restrictions on authorizing competitive motor bus service, see MONOPOLY AND COMPETITION, 30–34.

Annotation on automobile service, pp. 599, 860.
Annotation on water service, p. 601.

a. Electric.

Exception to court ruling admitting evidence of rules of Commission regulating electric wiring as ground for reversal, see APPEAL AND REVIEW, 25.

Power of Commission to limit liability for electric service, see COMMISSIONS, 1.

26. Revised rules and regulations governing the construction, operation, and maintenance of lines and equipment owned, managed, operated, or controlled by public utilities for the transmission of electricity were adopted. Re Rules and Regulations Governing Electric Lines (Wis.) 716.
P.U.R.1928A.

SERVICE—*continued.*

b. Gas.

Gas rates as affected by B.T.U. in gas supplied, see RATES, 23.

27. Each utility supplying gas was ordered to establish and maintain for its product a standard heating value of the total monthly average of gas delivery within one mile of the central point of distribution and expressed in B.T.U. per cubic foot as a part of its schedule of rates on file with the Commission. Re Rule 18 Regulating Heating Value of Gas (Colo.) 657.

c. Railroad.

Statutory provision requiring equality of accommodations by railroad as meaning reasonable as well as equal facilities, see supra. 5.

Discontinuance of railroad service, see supra, 18, 19.

Substitution of motor bus service for railway service, see supra, 22–25.

Order requiring new station, based on petition that present passenger station is inadequate for passenger or freight service, as necessarily involving both kinds of service, see APPEAL AND REVIEW, 5.

Order changing layout of track as incident to improvement of station facilities, see APPEAL AND REVIEW, 6.

Commission order for extension of railroad sidjng as not disturbed by court because of claim that extension is not workable on account of grades, where there is evidence reasonably supporting finding that extension is workable, see APPEAL AND REVIEW, 15.

Commission jurisdiction to entertain petition to restrain railroad from substituted inferior accommodation at agency station, see COMMISSIONS, 15.

Constitutionality of order requiring railroad company to erect new station, see CONSTITUTIONAL LAW, 10.

Sustaining objection to question on cross-examination in proceeding to restrain railroad from substituting care-taker for agency service at certain station, see EVIDENCE, 12.

Lack of power of State Commission to vary plans approved by Interstate Commerce Commission for erection of interstate union station, see INTERSTATE COMMERCE, 1.

Assumption by State Commission of comparative accuracy of estimate of Interstate Commerce Commission as to probable cost of union station, see INTERSTATE COMMERCE, 2.

Entry of order by State Commission specifically conditioned upon promulgation by Interstate Commerce Commission of such further certificates and findings as might be necessary to authorize construction, extensions, and abandonment incident to establishment of interstate union terminal, see INTERSTATE COMMERCE, 3.

Jurisdiction over spur tracks extending from end of existing main line, see INTERSTATE COMMERCE, 5.

Inauguration of pick-up-and-delivery service by electric railway notwithstanding service rendered by motor transportation utility, see MONOPOLY AND COMPETITION, 26.

SERVICE—*continued.*
Rehearing of Commission proceeding in which railroad is ordered to extend siding on private property to adjoining land, see REHEARING, 1.

Annotation on railroad service, p. 600.
Annotation on street railway service, p. 600.
Discussion of the inability of any street railway system to provide each rider with a seat during rush hours, p. 841.

28. Through and separate passenger service should be established in territory where public convenience, industrial, and community growth, and the unsafe, circuitous, and broken up condition of existing routeings call for more expeditious, direct and regular service between appropriate centers, and where revenues from the system as a whole in that territory amply warrant the inauguration of such service. Daly v. Chicago, B. & Q. R. Co. (Ill.) 661.

29. Through train service should be established between strategic points where through mutual connection to all parts of a state would thereby be affected, giving stations along such route access to practically every line in the state and affording opportunities to patrons of these lines to travel out of the state in all directions with greatest convenience of connection and where the revenue from traffic in the territory as a whole amply warrants such service. Daly v. Chicago, B. & Q. R. Co. (Ill.) 661.

30. It is the duty of every railroad to operate a separate service for passengers and freight, and the operation of a freight train with passenger accommodations in a caboose, or else wholly by mixed trains, is inadequate to meet public conveniences and is not a compliance with the charter duty of the carrier. Daly v. Chicago, B. & Q. R. Co. (Ill.) 661.

31. By reason of loss of patronage likely to result from impaired service the Commission did not believe a reduction in scheduled interurban railway cars to one every two hours would sustain sufficient revenue to warrant the action. Re Hudson Valley R. Co. (N. Y.) 1.

32. The kind of service to which patrons of a railroad station are entitled does not depend alone on their convenience or the self-supporting status of the station, but of equal importance are the elements of cost of service, volume of business, and the proximity and accessibility of other stations. Royalton v. Central Vermont R. Co. (Vt. Sup. Ct.) 633.

33. The fact that a spur track applied for has already been built by the applicant does not preclude the operation of a statute because of a requirement that the railroad "construct, connect, maintain, and operate" the same; since the carrier may reconstruct at the industry's expense if the track is not found to be standard. Stange Lumber Co. v. Chicago, M. & St. P. R. Co. (Wis.) 721.

d. Telephone.

Annotation on telephone service, p. 600.

34. To conform with the policy of the State Commission forbidding the ownership and maintenance of phones by subscribers, the payment of $1.60 per annum rental for each phone was ordered where the utility, formerly a mutual company, still had all phones owned by patrons. Re Industry Teleph. Co. (Ill.) 435.

SERVICE—*continued.*

35. The program of a utility operating a number of lines, some of which were still grounded, in proposing to metallicize about five miles of ground line each year with the consent of the majority of subscribers on each line in turn, was approved and commended. Re North-West Teleph. Co. (Wis.) 480.

SEWERS.

Actual records or city map as basis for valuing main, see EVIDENCE, 1.

SIDINGS.

Commission order for extension of railroad siding as not disturbed by court because of claim that extension is not workable on account of grades, where there is evidence reasonably supporting finding that extension is workable, see APPEAL AND REVIEW, 15.

Rehearing of Commission proceeding in which railroad is ordered to extend siding on private property to adjoining land, see REHEARING, 1.

Lack of Commission jurisdiction to order railroad to extend siding on private property, see SERVICE, 3.

SIGHT-SEEING BUSSES.

Authority for motor carrier service for accommodation of sightseeing and tourist business for one year trial period, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 47.

SOLICITATIONS.

General solicitation of business as an indication of public utility status, see PUBLIC UTILITIES, 8.

Solicitation of business and cost of equipment as affecting rates for air heating, see RATES, 21, 22.

SPECULATION.

Authorization of motor carrier service by receivers of trolley line dependent upon prompt installation of actual service to avoid speculation, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 48.

SPUR TRACKS.

Application for spur track extending from end of existing main line as not evasion of statutes requiring certificate as condition precedent to construction of extension of main line, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 4.

Jurisdiction over spur tracks extending from end of existing main line, see INTERSTATE COMMERCE, 5.

Rehearing of Commission proceeding in which railroad is ordered to extend siding on private property to adjoining land, see REHEARING, 1.

Lack of Commission jurisdiction to order railroad to extend siding on private property, see SERVICE, 3.

SPUR TRACKS—*continued.*

Fact that spur track applied for has already been built by applicant as not precluding operation of statute because of requirement that railroad construct, connect, maintain, and operate the same, see SERVICE, 33.

STANDARDS.

Gas rates as affected by B.T.U. in gas supplied, see RATES, 23.

Gas utility standards, see SERVICE, 27.

STAND-BY EQUIPMENT.

Valuation of stand-by equipment, see VALUATION, 18–20.

STATEMENTS.

Invalidity of Commission rule providing that no statement of utility employee shall bind company unless in writing and approved by official thereof, see COMMISSIONS, 9.

STATES.

Question of validity of municipal ordinance as not to be passed upon by Supreme Court of United States without aid of discussions by members of lower courts familiar with local law, see APPEAL AND REVIEW, 3.

Construction of bridge by state to compete with toll bridge company operating under state franchise as not confiscatory, see CONSTITUTIONAL LAW, 12.

Jurisdiction over interstate commerce, see INTERSTATE COMMERCE.

Powers over rates, see RATES, 2.

STATIONS.

Order requiring new station, based on petition that present passenger station is inadequate for passenger or freight service, as necessarily involving both kinds of service, see APPEAL AND REVIEW, 5.

Order changing layout of track as incident to improvement of station facilities, see APPEAL AND REVIEW, 6.

Apportionment of revenues between stations, see APPORTIONMENT, 1.

Commission jurisdiction to entertain petition to restrain railroad from substituted inferior accommodation at agency station, see COMMISSIONS, 15.

Constitutionality of order requiring railroad company to erect new station, see CONSTITUTIONAL LAW, 10.

Sustaining objection to question on cross-examination in proceeding to restrain railroad from substituting care-taker for agency service at certain station, see EVIDENCE, 12.

Lack of power of State Commission to vary plans approved by Interstate Commerce Commission for erection of interstate union station, see INTERSTATE COMMERCE, 1.

STATIONS—*continued.*

Assumption by State Commission of comparative accuracy of estimate of Interstate Commerce Commission as to probable cost of union station, see INTERSTATE COMMERCE, 2.

STATUTE OF FRAUDS.

Overruling demurrer to plea of statute of frauds improperly interposed as defense to suit for damages resulting from fire caused by defective wiring as prejudicial error, see APPEAL AND REVIEW, 24.

Statute of frauds as not a valid defense in negligence suit where contract is immaterial to liability, see CONTRACTS, 1.

STATUTE OF LIMITATIONS.

Time limitation for complaint asking reparation, see REPARATION, 2.

STATUTES.

Certificate as not required retroactively approving and authorizing construction which took place prior to act requiring certificate, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 20.

Operation in good faith prior to regulation act, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 30, 31.

Interpretation of statute to determine Commission jurisdiction, see COMMISSIONS, 7.

Retrospective legislation under constitution, see CONSTITUTIONAL LAW, 17, 18.

Interpretation of statute altering, amending, or repealing existing franchise, see FRANCHISES, 1.

Toll bridge utility operating under indeterminate permit as not protected from competition by law expressly limiting such protection to heat, light, water, power, and telephone utilities, see MONOPOLY AND COMPETITION, 6.

Mandatory character of statute requiring Commission before it sets aside rates fixed by carrier to determine that the same are unjust and unreasonable, see RATES, 3.

Fact that spur track applied for has already been built by applicant as not precluding operation of statute because of requirement that railroad construct, connect, maintain, and operate the same, see SERVICE, 33.

1. Where a statute (subsec. 39, § 1294d Pollard's Code 1904) providing for maintenance by railroads of "existing" highway viaducts has been omitted in a subsequent revision of the state code (1919) purporting to cover such passages (Michie's Code 1924, § 3974a) either by purpose or mistake the prior provisions are by construction annulled and the common law again in force if the new legislation does not specifically cover the situation, and upon that construction the expense must be borne by the city or county. Com. ex rel. Richmond v. Richmond, F. & P. R. Co. (Va.) 291. P.U.R.1928A.

STOCK.

Generally, see SECURITY ISSUES.

Requirement that prospective subscribers take stock in company in order to receive service as unlawful, see SERVICE, 6.

STOCK DIVIDENDS.

Stock dividends and surplus as expressing measure of going value, see VALUATION, 28.

STOCKHOLDERS.

Proper questioning of witness in Commission investigation, see EVIDENCE, 2–6.

Duty of public service corporations and stockholders to divulge corporate holdings, see PUBLIC UTILITIES, 4.

STOPS.

Commission power to determine validity of ordinance prohibiting automobiles from stopping to receive or discharge passengers on streets where there are street cars, see COMMISSIONS, 14.

STREET RAILWAYS.

Preference of receivers of street railway in establishment of bus route over old traction routes, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 44.

Authorization of motor carrier service by receivers of trolley line dependent upon prompt installation of actual service to avoid speculation, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 48.

Lack of Commission jurisdiction to enforce provisions of ordinance requiring traction company to make repairs to pavement, see COMMISSIONS, 11.

Commission power to determine validity of ordinance prohibiting automobiles from stopping to receive or discharge passengers on streets where there are street cars, see COMMISSIONS, 14.

Necessity of evidence to show that selling party still has in fact possession of stock and is in position to carry out terms of original contract to warrant reconsideration by Commission of former ruling refusing permission to traction utility to purchase capital stock of bus utility, see CONSOLIDATION, MERGER, AND SALE, 1.

Lack of Commission control over question of wage increases on street railway, see LABOR, 1.

Right of street railway company to discharge motorman for engaging in brawl, see LABOR, 2.

Competition by transportation companies, see MONOPOLY AND COMPETITION, 11–27.

Rapid transit utilities organized as railroads and not as electrical corporations for purpose of doing railroad business which sells some of surplus power as not electrical corporation or subject to Commission jurisdiction, see PUBLIC UTILITIES, 12.

STREET RAILWAYS—*continued.*

Mandatory character of statute requiring Commission before it sets aside rates fixed by carrier to determine that the same are unjust and unreasonable, see RATES, 3.

Street railway rates, see RATES, 24–28.

Allowance for contingent reserve of street railway, see RETURN, 3.

Charge to railway department of combined utility for electricity supplied by electric department, see RETURN, 4.

Charges to operating expenses of street railway for street paving costs and gross receipts tax, see RETURN, 5.

Reasonableness of return as a whole, see RETURN, 11.

Allowance for return, see RETURN, 17–19.

Allowance of increased rates rather than serious impairment of service by proposed operating economies, see RETURN, 17.

Reorganization plan of street railway, see SECURITY ISSUES, 4–7.

Discontinuance of unprofitable street railway service, see SERVICE, 14–17.

Substitution of motor bus service for railway service, see SERVICE, 22–25.

1. Where a former ordinance (No. 32, March 4, 1903) providing for the entire maintenance of paving between and outside of the track of a street railway company to the distance of 2 feet, by the utility, has been modified by an act (Chap. 129, N. J. Laws, 1927) providing that the paving between and outside of the track to a distance of 18 inches shall be repaired by the utility for any "damage by reason of the operation of street railway cars over such tracks," the paving liability of the company that can be enforced by the Board is limited to only such damage as is caused by such operation, whether before or since the passage of the act and to such area as is specified by it. Leonia v. New Jersey & H. R. R. & Ferry Co. (N. J.) 464.

2. The presence of railway track ties in a street is not the proximate cause of damage to the pavement and to the shifting of the ties so as to make the railway company liable for cost of repaving under a law limiting liability to such damage as is caused by street car operation, where the shifting of the ties was due to disintegration of the pavement by reason of other traffic and the elements. Leonia v. New Jersey & H. R. R. & Ferry Co. (N. J.) 464.

3. Testimony having clearly indicated that damage to pavement was but partly due to the operation of street cars and the testimony of the proportion of damage due to other causes being indefinite, no order concerning the apportioning of the cost of repaving between the borough and the utility will be made until subsequent proceedings reasonably establish the ratio of liability. Leonia v. New Jersey & H. R. R. & Ferry Co. (N. J.) 464.

STUDENTS.

Cash and ticket fares on street railway with reduced rate for school children, see RATES, 24.

STUDENTS—*continued.*
Fares for school children with plan for tickets, tokens, and sale of books, see RATES, 26.
Modification of proposed increase of fares for pupils, see RATES, 27.

SUBSTANTIVE LAW.
Invalidity of Commission rule providing that no statement of utility employee shall bind company unless in writing and approved by official thereof, see COMMISSIONS, 9.

SUBSTITUTION.
Substitution of different kinds of service, see SERVICE, 22–25.

SUBURBAN SERVICE.
Street railway fare for suburban service, see RATES, 25.

SUBWAY.
Overhead crossing as preferable to subway, see CROSSINGS, 6.

SURPLUS.
Stock dividends and surplus as expressing measure of going value, see VALUATION, 28.
Use of property measured by revenue derived therefrom expressed in dividends and surplus as determining going value, see VALUATION, 29.

SWITCHING.
Treatment of cost of switching service of telephone company, see RETURN, 9.

TAMPERING.
Discontinuance of service because of tampering with meter to divert electric current, see SERVICE, 13.

TANGIBLE PROPERTY.
Valuation of, see VALUATION, 13–24.

TAXES.
Revocation of certificate for failure to pay tax or file monthly report of mileage, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 52.
Lack of Commission jurisdiction over levying or collecting of license tax by motor bus operator, see COMMISSIONS, 5.
Charges to operating expenses of street railway for street paving costs and gross receipts tax, see RETURN, 5.

TELEPHONES.
Effect of utility's refusal of suggestion as to economies to avoid re-entry into area, creating burdens of duplication of service, see COMMISSIONS, 12.

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TELEPHONES—*continued.*

Free interexchange service as discriminatory, see DISCRIMINATION, 1, 4.

Competition by telephone companies, see MONOPOLY AND COMPETITION, 7–10.

Former mutual telephone company which presently serves 200 or more subscribers not stockholders as a public utility, see PUBLIC UTILITIES, 3.

Right of utility to reduce rates without formality of hearing by merely filing new schedule with Commission, see RATES, 5.

Value of telephone service to subscriber as affected by size of exchange, number of subscribers, business and resident, density of population, size, character, saturation, and economic condition of territory served and nature of use made of service, see RATES, 9.

Telephone rates, see RATES, 29, 30.

Temporary Commission order to test accuracy and reasonableness of proposed telephone rates as subject to review by court, see RATES, 39.

Commission orders pending review, see RATES, 40–42.

Limitation on compensation of officer of telephone utility, see RETURN, 8.

Treatment of cost of switching service of telephone company, see RETURN, 9.

Change from grounded lines to metallic lines as affecting operating expenses, see RETURN, 10.

Allowance for return, see RETURN, 20–22.

Requirement that prospective subscribers take stock in company in order to receive service as unlawful, see SERVICE, 6.

Telephone service, see SERVICE, 34, 35.

TENANTS.

Invalidity of municipal ordinance requiring owner to pay delinquent bill for water furnished to tenant, see CONSTITUTIONAL LAW, 11.

TESTIMONY.

See EVIDENCE.

TEST PERIOD.

Test period for rates, see RATES, 37–42.

THEFT.

Discontinuance of service because of tampering with meter to divert electric current, see SERVICE, 13.

TICKETS.

Cash and ticket fares on street railway with reduced rate for school children, see RATES, 24.

Fares for school children with plan for tickets, tokens, and sale of books, see RATES, 26.

TIME.

Time limitation upon appeal from Commission order, see APPEAL AND REVIEW, 30.

Time limitation for complaint asking reparation, see REPARATION, 2.

TITLE.

Valuation of jointly used property regardless of question of title, see VALUATION, 16.

TOKENS.

Fares for school children with plan for tickets, tokens, and sale of books, see RATES, 26.

TOURISTS.

Authority for motor carrier service for accommodation of sightseeing and tourist business for one year trial period, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 47.

TRACKS.

Order changing layout of track as incident to improvement of station facilities, see APPEAL AND REVIEW, 6.

Application for spur track extending from end of existing main line as not evasion of statutes requiring certificate as condition precedent to construction of extension of main line, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 4.

Jurisdiction over spur tracks extending from end of existing main line, see INTERSTATE COMMERCE, 5.

Damage to paving by street car operation, see STREET RAILWAYS, 1–3.

TRACTION COMPANY.

Proper questioning of witness in Commission investigation, see EVIDENCE, 2–6.

TRAINMEN.

Lack of Commission jurisdiction over petition for order requiring flagman or conductor on all light engine movements on main track, see COMMISSIONS, 2.

TRAINS.

Revenue per train as an element to be considered in deciding whether service should be discontinued, see SERVICE, 18.

Passenger train service, see SERVICE, 28–30.

TRANSFER.

Of certificate of convenience and necessity, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 54.

TRANSIT COMMISSION.
See COMMISSIONS.

TRANSMISSION LINE.
Current generated in foreign state by power utility whose only local equipment is of stand-by character as interstate commerce, see INTERSTATE COMMERCE, 4.

TRANSPORTATION COMPANIES.
Competition by transportation companies, see MONOPOLY AND COMPETITION, 11–27.

TRIAL PERIOD.
Authority for motor carrier service for accommodation of sightseeing and tourist business for one year trial period, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 47.

UNEMPLOYMENT.
Unemployment as a factor affecting authorization of automobile service in competition with traction company, see MONOPOLY AND COMPETITION, 23.

UNIFORMITY.
Uniformity of toll charges, see RATES, 31, 34.

UNION STATION.
Lack of power of State Commission to vary plans approved by Interstate Commerce Commission for erection of interstate union station, see INTERSTATE COMMERCE, 1.
Entry of order by State Commission specifically conditioned upon promulgation by Interstate Commerce Commission of such further certificates and findings as might be necessary to authorize construction, extensions, and abandonment incident to establishment of interstate union terminal, see INTERSTATE COMMERCE, 3.

UNUSED PROPERTY.
Valuation of property not used or useful, see VALUATION, 14–20.

VALUATION.

I. Ascertainment of value generally, 1, 2.
II. Ascertainment of value for rate making, 3–11.
a. In general, 3–5.
b. Measures of value, 6–11.
III. Ascertainment of value for purpose of security issues, 12.
IV. Tangible property, 13–24.
a. Property paid for by consumers, 13.

VALUATION—*continued.*
IV.—continued.
b. Property not used or useful, 14–20.
1. In general, 14–17.
2. Stand-by equipment, 18–20.
c. Working capital, 21–24.
V. Going value, 25–30.

I. Ascertainment of value generally.

Credibility of expert testimony as affected by personal interest of witness, see EVIDENCE, 7.

Annotation on ascertainment of value and cost generally, p. 75.
Annotation on ascertainment of value for consolidation and sale, p. 80.
Annotation on nonphysical elements affecting value, p. 80.
Valuation on overhead expenses, p. 80.
Annotation on paving over mains, p. 81.
Annotation on property not used or useful, p. 82.
Annotation on valuation of franchises, p. 84.

1. The burden of proof is cast upon a utility seeking increased rates to prove a true valuation of the properties involved. Re Fresno Traction Co. (Cal.) 167.

2. A correction offered by the Commission engineer to a utility estimate of value, if unobjected to, will be accepted as well founded. Re Home Teleph. Co. (Ind.) 445.

II. Ascertainment of value for rate making.

a. In general.

Annotation on ascertainment of value for rate making generally, p. 76.
Annotation on ascertainment of original or historical cost of investment, p. 79.

3. Assumptions for purposes of valuation must be based on actual historical facts, allowing for incidental or accidental economies, and not upon a theoretical basis of new cost of reproduction for every item. Re Home Teleph. Co. (Ind.) 445.

4. The assumption that patronage attached must be secured at great expense was held to be, in the main, contrary to fact. Re Home Teleph. Co. (Ind.) 445.

5. The findings of a Master appointed by a Federal District Court, although not conclusive as to value of utility property, are evidence of a high order. Re Omaha & C. B. R. & Bridge Co. (Neb.) 689.

b. Measures of value.

Duty of Commission to follow decisions of superior court to the effect that reproduction cost new less depreciation must be given consideration in ascertaining fair value, see COMMISSIONS, 19.

Annotation on measures of value for rate making, p. 78.
Discussion of reproduction cost as a measure of value, p. 837.

VALUATION—*continued.*

6. A contention that the Commission refused to consider reproduction cost is unfounded where the only evidence produced by the utility upon the subject was a witness who admitted using uncertain assumptions rendering his estimate inaccurate. Sutter Butte Canal Co. v. Railroad Commission (Cal. Sup. Ct.) 811.

7. Fair value is not stated by a reproduction cost estimate which assumes that the property is not in existence, as this assumption is contrary to fact. Re Home Teleph. Co. (Ind.) 445.

8. Book value will not provide a fair rate base where appraisal value has been injected into the entries. Re Home Teleph. Co. (Ind.) 445.

9. An increase of rates was allowed a street railway company on a valuation measured by the outstanding securities. Re Holyoke Street R. Co. (Mass.) 578.

10. The Commission will not make a finding of value based solely upon cost, in view of increased values since construction, as well as the decisive precedents set by the United States Supreme Court. Re Omaha & C. B. R. & Bridge Co. (Neb.) 689.

11. Reproduction new less depreciation is the dominant factor in the ascertainment of fair value. Re Omaha & C. B. R. & Bridge Co. (Neb.) 689.

III. Ascertainment of value for purpose of security issues.

12. While the procedure of valuing only operating property of a utility is proper in rate cases, in a reorganization proceeding involving the issuance of securities, all the property must be considered. Re United R. Co. (Mo.) 202.

IV. Tangible property.

Actual records or city map as basis for valuing main, see EVIDENCE, 1.

Annotation on property not paid for, p. 81.

a. Property paid for by consumers.

Annotation on property paid for by consumers, p. 83.

13. A sum donated by assessed consumers to contribute to the construction at peak prices of an emergency pumping station, was properly excluded by the Commission from the rate base of a canal company, which was allowed only the sum actually expended by itself. Sutter Butte Canal Co. v. Railroad Commission (Cal. Sup. Ct.) 811.

b. Property not used or useful.

1. In general.

14. Land bought in advance for proposed and necessary expansion construction was allowed to be included in valuation of property used and useful of a water utility where sound business reasons for such a move were shown. Re East St. Louis & I. Water Co. (Ill.) 57.

15. Amounts deducted from the rate base for unused property should include not only the basic figures representing the values of the items, but also intangible allowances. Re Lakewood Water Co. (N. J.) 705.

VALUATION—*continued.*

16. That part of a general meter building used jointly by several companies as a shop which is used for water company purposes may be included in the rate base, although the company does not own the building, since return on that value would be sufficient to pay a reasonable rental for so much of it as is occupied by the water company. Re Lakewood Water Co. (N. J.) 705.

17. The value of land not used and useful but necessarily acquired in connection with other land needed for right of way purposes was included in the rate base of a water utility where the cost of making the land salable would almost equal the amount claimed as a deduction and where some 2½ miles of right of way had been included at a value of $1. Re Lakewood Water Co. (N. J.) 705.

2. Stand-by equipment.

18. Obligations of a water utility's franchise requiring the maintenance of stand-by equipment in readiness for substitute service is sufficient cause for its allowance in valuation as used and useful property. Re East St. Louis & I. Water Co. (Ill.) 57.

19. Danger of interruption to filtration due to absolute dependency for operation upon distant and exposed electrical connections and a large transmission main, with the consequent shortage of city supply due to lack of storing equipment, is sufficient reason to maintain a yet efficient pumping station as used and useful property of a water utility for substitute service after the inauguration of a new station. Re East St. Louis & I. Water Co. (Ill.) 57.

20. Where there are local water storage facilities for only a few hours' city supply, an old pumping station, if still efficient, should be kept in service as used and useful property rather than provide additional storage at enormous expense, unless assurance can be had that no interruption to new service will be encountered. Re East St. Louis & I. Water Co. (Ill.) 57.

c. Working capital.

Annotation on materials and supplies, p. 83.

Annotation on specific allowances for working capital, p. 83.

21. Working capital should be given consideration in a valuation of street railway property for rate-making purposes. Re Georgia Power Co. (Ga.) 830.

22. Working capital of a water utility is in some measure gauged by the operating expenses, revenues, and collection periods. Re East St. Louis & I. Water Co. (Ill.) 57.

23. A reasonable allowance should be made for working cash capital in addition to the physical value of utility property in a valuation for rate making. Re Farmers Elevator Co. (N. D.) 469.

24. A reasonable allowance should be made for working cash capital in a valuation for rate making. Starkweather v. Northern Utilities Corp. (N. D.) 699.

V. Going value.

Annotation on going value, p. 84.

VALUATION—*continued.*

25. Going concern value should be given consideration in a valuation of street railway property for rate-making purposes. Re Georgia Power Co. (Ga.) 830.

26. The Commission, in computing valuation for rate-making purposes of a water utility, gave full consideration to the fact that it was a going concern with a value as such, in addition to the actual physical value. Re East St. Louis & I. Water Co. (Ill.) 57.

27. Operating revenues for fiscal periods were declared to have more bearing on going value than any per cent of the physical property. Re Home Teleph. Co. (Ind.) 445.

28. Stock dividends and a surplus were held to express the best measure of going value. Re Home Teleph. Co. (Ind.) 445.

29. The use of property, measured by the revenue derived therefrom, expressed in dividends and surplus, determines going value rather than the value of physical property as such. Re Home Teleph. Co. (Ind.) 445.

30. A reasonable allowance should be made for going concern value in a valuation for rate making. Starkweather v. Northern Utilities Corp. (N. D.) 699.

VALUE OF SERVICE.

Cost and value of service as affecting reasonableness of rates, see RATES, 9–13.

Rate of 5.28 per cent return on valuation of canal company as not confiscatory in view of complications in operating system and evidence tending to show rates in excess of value of service, see RETURN, 24.

VESSELS.

See BOATS.

VIADUCTS.

Suit against Commission under law giving body discretion in regulating viaduct structures as not subject to operation of later law making it mandatory unless found impracticable by the Commission that all viaducts should be at least 22 feet above track, see CONSTITUTIONAL LAW, 17, 18.

Bridges and crossings, see CROSSINGS.

Construction of statute providing for maintenance of viaducts by railroads, see STATUTES, 1.

WAGES.

Lack of Commission control over question of wage increases on street railroad, see LABOR, 1.

WAIVER.

Waiver of exception to inadmissible testimony, see EVIDENCE, 13.

WAIVER—*continued.*
Disapproval of unexplained and irrelevant clause confirming right of railroad to operate lines within city in contract between these two parties, see MUNICIPALITIES, 1.

WAR DEPARTMENT.
Grant of certificate to one of two applicants who possesses permit or authorization from Secretary of War to transport passengers in and upon grounds of Federal hospital, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 43.

WATER.
Ordinance assuming to protect public health but clearly designed to enforce collection of water rents under guise of police regulation, see CONSTITUTIONAL LAW, 6–8.
Allowance for depreciation, see DEPRECIATION, 1, 2.
Ordinance of municipality engaged in furnishing water prescribing rules and regulations for the same as having no greater force than by-law of private corporation, see MUNICIPAL PLANTS, 4.
Minimum water charges, see RATES, 15–17.
Proper minimum charge for each customer as dependent upon size of meter, see RATES, 17.
Water rates, see RATES, 35, 36.
Payment of percentage of gross revenues of water utility to parent company in lieu of salaries of general officers in recompense for engineering, accounting, and other services, see RETURN, 7.
Allowance for return, see RETURN, 23.
Valuation of stand-by equipment which is required by franchise, see VALUATION, 18–20.

WIRES AND CABLES.
Exception to court ruling admitting evidence of rules of Commission regulating electric wiring as ground for reversal, see APPEAL AND REVIEW, 25.
Rules and regulations governing construction, operation and maintenance of electric lines and equipment, see SERVICE, 26.

WIRING.
Overruling demurrer to plea of statute of frauds improperly interposed as defense to suit for damages resulting from fire caused by defective wiring as prejudicial error, see APPEAL AND REVIEW, 24.

WITNESSES.
See also EVIDENCE.
Burden of proof upon Commission to establish materiality of testimony sought to be elicited by interrogatories during investigation, see APPEAL AND REVIEW, 28.

WITNESSES—*continued.*

Interrogatory powers of Commission in conducting transit investigations, see COMMISSIONS, 21–23.

Fact that material question asked by Commission involves personal affairs as not exempting witness from reply, see CONSTITUTIONAL LAW, 9.

Proper questioning of witness in Commission investigation, see EVIDENCE, 2–6.

WORKING CAPITAL.

Treatment of, in valuation, see VALUATION, 21–24.

ZONES.

Adjustment to obtain zoning equality on street railway, see RATES, 28.